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TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1920

No. [redacted]106

SOUTHERN PACIFIC COMPANY, PETITIONER,

vs.

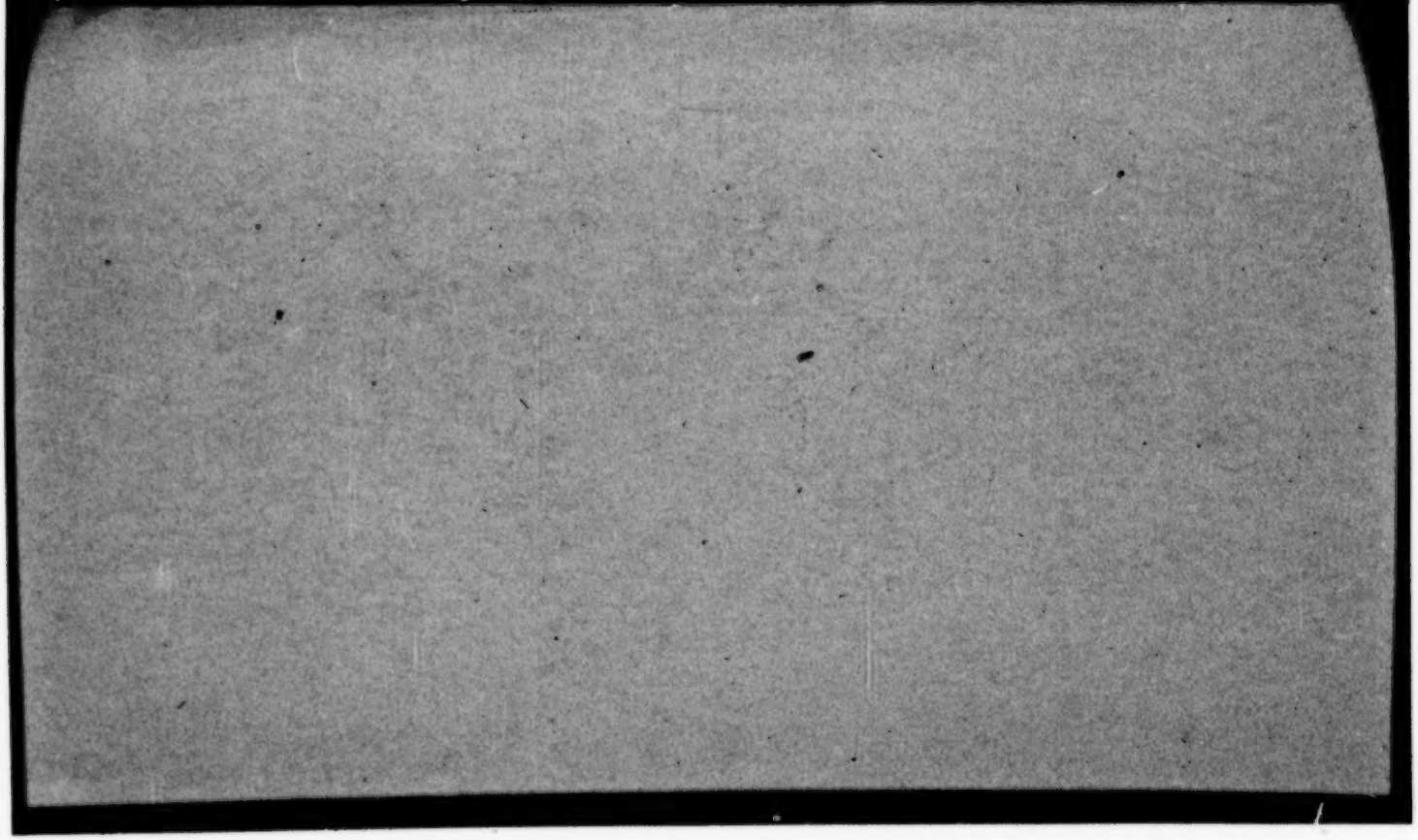
W. S. BERKSHIRE, TEMPORARY ADMINISTRATOR AND PERSONAL REPRESENTATIVE OF THE ESTATE OF WILLIAM A. LINDER, DECEASED.

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE EIGHTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

PETITION FOR CERTIORARI FILED MAY 20, 1919.

CERTIORARI AND RETURN FILED JULY 23, 1919.

(27,120)



(27,120)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 1034.

SOUTHERN PACIFIC COMPANY, PETITIONER,

vs.

W. S. BERKSHIRE, TEMPORARY ADMINISTRATOR AND PERSONAL REPRESENTATIVE OF THE ESTATE OF WILLIAM A. LINDER, DECEASED.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE EIGHTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 23, 1919.

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a In Court of Civil Appeals, Eighth Supreme Judicial District of Texas, El Paso.

No. —.

SOUTHERN PACIFIC COMPANY, Appellant,

vs.

W. S. BERKSHIRE, Admr., Appellee.

Transcript of all proceedings had on the appeal of said cause both in the Supreme Court of Texas and in the said Court of Civil Appeals. Applied for by M. Nagle, Esq., on the 2nd day of May, A. D. 1919, and delivered to said M. Nagle, Esq., on May 8th, A. D. 1919.

J. I. DRISCOLL, *Clerk*.

1 In the Supreme Court of the United States.

No. —.

SOUTHERN PACIFIC COMPANY, Petitioner,

v.

W. S. BERKSHIRE, Administrator and Personal Representative of the Estate of W. A. Linder, Deceased, Respondent.

Certified Copy of the Transcript of the Record, Including All Proceedings Had, in said Cause in the Supreme Court of the State of Texas and in the Court of Civil Appeals of the Eighth Supreme Judicial District of the State of Texas.

Caption.

THE STATE OF TEXAS,
County of El Paso, ss:

Be it remembered that at a term of the Honorable Court of Civil Appeals in and for the Eighth Supreme Judicial District of the State of Texas, begun and holden in the City and County of El Paso, and State aforesaid on the 7th day of October, A. D. 1918, and now in session, the following cause came on to be considered and determined on appeal, and the following proceedings were had therein, to-wit:

No. 891.

SOUTHERN PACIFIC COMPANY, Appellant,

vs.

W. S. BERKSHIRE, Admr., Appellee.

2 THE STATE OF TEXAS,
County of El Paso:

At a term of the District Court, 41st Judicial District, begun and holden at El Paso, within and for the County of El Paso, before the Honorable P. R. Price, Judge, and ending on the 5th day of January, A. D. 1918, the following cause came on for trial, to-wit:

No. 14472.

W. S. BERKSHIRE, Administrator of the Estate of W. A. Linder, Deceased,

vs.

SOUTHERN PACIFIC COMPANY.

Plaintiff's Amended Original Petition.

Filed Sep. 27, 1917.

In the District Court of the 41st Judicial District in and for El Paso County, Texas, November Term, 1917.

No. 14472.

W. S. BERKSHIRE, Admr.,

vs.

THE SOUTHERN PACIFIC COMPANY.

To the Hon. P. R. Price, judge:

Your petitioner, W. S. Berkshire, in his official capacity, hereinafter styled plaintiff, complaining of the Southern Pacific Company, hereinafter styled defendant, after leave of the Court first had and obtained filed this his first amended original petition, and for amendment and cause of action respectfully represents and shows to the Court:

I.

That plaintiff resides in El Paso County, Texas. That the defendant is a foreign railway corporation, duly and legally incorporated, and maintains an office and local agent in El Paso County,

Texas; That heretofore, on and prior to the 3rd day of July, 1916, the defendant was a common carrier by railway, and owned, maintained and operated a line of railroad extending from El Paso, Texas, through the State of Arizona to and into Tucson, Arizona, and was engaged in the business of an interstate carrier by railway for
3 hire over the aforesaid line of railroad. That on and prior to the 3rd day of July, 1916, one, William A. Linder, was employed by the defendant as a locomotive engineer and resided in El Paso, Texas, and while engaged in the duties incident to his employment in running and operating one of defendant's trains engaged in interstate commerce, met with an accident at Carney, N. M., and was so badly injured as to cause his death soon thereafter without any fault or contributory negligence on his part.

II.

That on or about the — day of February, 1917, your petitioner was, by the County Court of El Paso County, Texas, duly and legally appointed temporary administrator and personal representative of the estate of said William A. Linder, deceased, with full power and authority to file this suit and prosecute the same to final termination. That soon after said appointment your petitioner qualified as such temporary administrator and personal representative, and is now the temporary administrator and personal representative of the estate of said deceased with full power and authority to prosecute this suit on behalf of the surviving wife and children of said deceased.

III.

That on or about the 3rd day of July, 1916, said deceased was ordered and directed to run and operate a locomotive attached to one of defendant's trains between El Paso, Texas, and Deming, N. M. That when said train arrived at Carney, N. M., while deceased was in the exercise of due care for his own safety and running and operating said engine and train, and while occupying the usual and customary position in the cab of said engine he was struck on the head by a mail crane or some obstruction maintained too close to the track and cab, and so badly injured as to cause his death on or about the 11th day of July, 1916. Plaintiff says it was the duty of said defendant to furnish for the use of said deceased a reasonably safe roadbed and track free from all obstructions which might be
4 placed on the side of the track, and to place and maintain the mail cranes at a reasonably safe distance from the track so that said mail cranes would not extend over towards the track and cab of the engine in such close proximity as to endanger the lives of the engineers who might be operating engines by said mail cranes, and plaintiff says that said mail crane or obstruction which struck said deceased was placed and maintained by the defendant too close to the track, and in such close proximity to the track as to leave an insufficient space intervening between the side of the cab of the engine and the end of said mail crane, and so close as to inter-

fere with the proper operation of defendant's engines, and so close to the track that the end of said mail crane struck said deceased while he was occupying the usual and customary position in the cab while operating said train through said point, and plaintiff says that said defendant, and its duly authorized agents, were guilty of negligence in placing and maintaining said mail crane at the point, place and position the same was maintained, and were guilty of negligence in placing said mail crane and operating the same in such position and location that the end of said mail crane would extend so close to the track and the cab of said moving engine as to strike said deceased while occupying his usual and customary position in said cab, and were guilty of negligence in not placing said mail crance at a reasonably safe distance from the tract so that the same would leave sufficient space intervening between the end of said mail crane and the side of the cab so as to leave sufficient room that the engineers could look out the side of the cab and perform their *their* duties in the usual and customary manner and way in which said duties are performed by the engineers under like circumstances, and were guilty of negligence in not notifying and warning deceased of the close proximity of the end of said mail crane to the side of the cab.

IV.

Plaintiff further avers and charges that at the time of the happening of said accident, and long prior thereto, Carney was what was known as a blind siding, and that said defendant did not maintain any office or agent at said point. That under the laws governing the carrying of mail by defendant and statutes of the United States of America, as well as the rules and regulations of the United States Postal Department, the defendant was not allowed or permitted to hang mail sacks on mail cranes except for trains that would take off said mail sacks, and in no event was the defendant allowed to hang a mail sack on a mail crane and permit the same to remain hanging on said mail crane more than 10 minutes prior to the time when the train should arrive which would pick it up, or take off the mail sack, and plaintiff says that the train on which deceased was working was not a mail train, and that said deceased did not know and had no reason to believe that said mail sack would be hung on the mail crane until after he had passed said station, and plaintiff says that said defendant, as well as the person who hung said sack was guilty of negligence in hanging the mail sack on said mail crane at the time same was hung, and was guilty of negligence in placing said mail crane at said blind siding without placing a competent, careful and suitable agent at said station whose duty it should have been to ascertain the time when the mail train would be due or arrive, and to refrain from placing said mail sack on the mail crane and allow the same to hand thereon when other trains than the mail train were passing said station, and was guilty of negligence in hanging up said mail sack and allowing the same to remain there for a period of more than ten minutes prior to the time of the arrival of the mail train. That if said defendant had main-

tained at said station a competent and careful agent, or person whose duty it was to hang up the mail sack at the proper time and for the proper train, said mail sack would not have been hung up for the train of deceased and he would not have been injured, and plaintiff says that said defendant was guilty of negligence in placing said mail crane at said blind siding without placing some person
6 in charge of the same and one who would not hang the mail sack on the mail crane for any other train than the mail train, and then hung up the sack for a period of ten minutes only prior to the arrival of the mail train, and was guilty of negligence in authorizing, allowing and permitting the person who hung said mail sack on said mail crane to hang the same at any time that might be convenient to him, and was guilty of negligence in not inspecting and directing the party who did hang said mail sack to refrain from hanging the same on the mail crane for any train except a mail train, and then to hang the same for a period of not more than ten minutes prior to the arrival of said mail train, and was guilty of negligence in placing said mail crane at Carney, N. M., without placing a telephone at said point so that the party in charge of hanging the mail sack could know at what time the trains would arrive that would take the mail sack off the mail crane.

V.

Plaintiff further avers and charges that it was the duty of said defendant to furnish for the use of said deceased when leaving El Paso a reasonably safe and suitable engine, with all machinery and appliances in reasonably safe condition, and to inspect said engine, or cause same to be inspected prior to leaving El Paso in order to ascertain whether or not the machinery and appliances were in reasonably safe condition, but plaintiff avers and charges that when said engine was turned over to deceased at El Paso some portion or part of the machinery or appliances on said engine was out of order, unsafe, defective and in a dangerous condition, the exact and specific portion or part of said machinery and appliances with defects plaintiff is unable to specify, but which is fully known to said defendant, and was known to it, and its agents, at the time the engine left El Paso. That soon after leaving El Paso some portion or part of the machinery or appliances on said engine became out of order causing that part of the machinery to run hot and interferred with the proper operation of said engine by the deceased. That while
7 approaching Carney, N. M. said appliance, due to defects therein, and negligence of defendant, was running hot, thereby necessitating that deceased examine same, and that immediately prior to the time of said accident he had returned from the running board of the cab, and at the time of his accident was occupying the usual and customary position in the cab in order to examine and see the portion of the machinery that was running hot, and while thus engaged in the duties incident to his employment he was struck, and so badly injured as to cause his death thereafter, and plaintiff says that defendant was guilty of negligence in not furnish-

ing for the use of deceased reasonably safe engine and appliances, and was guilty of negligence in not inspecting said engine prior to the time it left El Paso and discovering the defects therein and remedy the same. That plaintiff has reason to believe, does believe and here alleges that the driving pin or some portion or part of the appliances of said engine which was running hot had been by the defendant's agents improperly placed and maintained in and on said engine and had been fastened down too tight, or at the time the same was repaired the employee of defendant who repaired the same neglected to properly oil or grease said portion or part of said appliance, or driving pin, and that by reason of the fact that said driving pin or applian e had been fasted in a negligent, careless and unskillful manner and way and fastened too tight, it caused the same to run hot, or by reason of the fact that the same was not properly oiled or greased when the driving pin was placed, or said appliance was fixed or repaired by defendant it caused it to run hot, and that when the same began to run too hot it was the duty of the engineer in charge of the engine to keep a constant lookout in order to ascertain whether or not said engine could be run to its destination while said driving pin was running hot, and plaintiff says that said defendant, and its duly authorized agents in placing and maintaining said driving pin in and on said engine in the manner, way and condition in which the same was placed, and in placing the same too tight, or in not properly and skillfully oiling and greasing
8 the same, were guilty of negligence, which said negligence and negligent acts and omissions caused said driving pin to run too hot, and caused plaintiff in the exercise of his duties as engineer to lean his head out of the cab window for the purpose of inspecting the same, and ascertaining the condition of said driving pin, which said negligence and negligent acts and omissions on the part of said defendant was the proximate cause of deceased leaning his head out of the window, and was the direct and proximate cause of his accident and consequent death, for which defendant is liable.

VI.

Plaintiff further avers and charges that at and prior to the time of the happening of said accident defendant, and its duly authorized agents, knew that said mail crane was placed and maintained too close to the track, and left an insufficient space intervening between the end of the mail crane and the side of the cab of the engine, and knew that it was usual, customary and necessary for engineers in the performance of their duty to look out of the side window of the cab when it became necessary to inspect their engines, or to keep a lookout ahead, and knew that by reason of the close proximity of said mail crane to the track of defendant or some other person would be killed or injured in the performance of their duty, and also knew that prior to the time said engine left El Paso the driving pin thereon was too tight or not properly or skillfully oiled or greased. That at the time of the happening of said accident deceased did not know, and had no reason to believe, that said mail crane would have

a mail sack hanging thereon, and did not know of the danger of being struck by said mail crane until too late to avoid his accident, and plaintiff says that each of the aforesaid negligent and careless acts and omissions on the part of said defendant, and its duly authorized agents, was the direct and proximate cause of said accident to deceased and his consequent death, for which defendant is liable.

9

VII.

Plaintiff says that at the time of said accident and death of said deceased he was a married man, and left surviving his wife, Mrs. William A. Linder, and three minor children, to-wit: William, aged 12; Eugene, aged 7; and Orville aged 5 years; all of whom were dependent upon said deceased for their support and maintenance. That said deceased at the time of the happening of said accident was earning Two Hundred Dollars ($200) per month, was a strong, healthy, able bodied man, was kind and affectionate to his wife and children, and by reason of the negligent killing of said deceased his said wife and children have suffered a great pecuniary loss.

VIII.

Plaintiff further avers and charges that said deceased survived said accident for a period of about eight days, during which time, or the greater part of said time he was conscious and suffered great mental and physical pain, due to the negligence of said defendant. Plaintiff says that in addition to the pecuniary loss suffered by said surviving wife and children, the plaintiff is entitled to a judgment for the conscious pain and suffering endured by said deceased from the time of his injury to the time of his death. That this suit is brought by your petitioner as temporary administrator and personal representative of the estate of said deceased in his official capacity, but for the sole use and benefit of the surviving wife and children of said deceased.

IX.

Plaintiff says that by reason of the aforesaid facts and injury and damage suffered to the estate of said deceased and his surviving wife and children, he is entitled to a verdict and judgment in the sum of Thirty Thousand Dollars. ($30,000.)

Wherefore, all parties being before the court, plaintiff prays that on final hearing he have judgment for the sole use and benefit of the surviving wife and children of said deceased in said sum of Thirty Thousand Dollars ($30,000), or in such sum as it may be shown by
10 the evidence said estate and the surviving wife and children of said deceased are entitled to in law, or under the facts, for which he will ever pray.

GEO. E. WALLACE,
Attorneys for Plaintiff.

(Endorsed:) No. 14472. In Dist. Court, El Paso Co., Texas. W. S. Berkshire, Admr. Estate W. A. Linder, dec'd. vs. So. Pac. Co. Amended Original Petition. Filed Sep. 27, 1917. C. M. McKinney, District Clerk.

Defendant's First Amended Original Answer.

Filed Dec. 10, 1917.

In the District Court of El Paso County, Texas, 41st Judicial District.

No. 14472.

W. S. BERKSHIRE, Administrator of the Estate of William A. Linder, Deceased,

vs.

SOUTHERN PACIFIC COMPANY.

Now comes the Southern Pacific Company, defendant in the above numbered and entitled cause, and by leave of the Court first had, files this its First Amended Original Answer in lieu of its Original Answer, and for such amended answer says:

1.

Defendant demurs to plaintiff's petition heretofore filed herein and for cause of exception says the same is insufficient in law and of this prays judgment of the Court.

BEALL, KEMP & NAGLE,
W. I. GILBERT,
Attorneys for Defendant.

2.

And for answer herein defendant denies, all and singular, the allegations in plaintiff's petition contained and says the same are not true and it is not guilty of the supposed wrongs, injuries and torts therein complained of, or of any of them, and of this puts itself upon the country.

BEALL, KEMP & NAGLE,
W. I. GILBERT,
Attorneys for Defendant.

11 3.

And further answering, defendant says that plaintiff's decedent met his death while in the employ of the defendant Company and while engaged in interstate commerce in the operation of a train then and there engaged in interstate commerce and plaintiff's death

was due to the risks and dangers assumed by him for which this defendant is not liable, all of which it stands ready to verify.

BEALL, KEMP & NAGLE,
W. I. GILBERT,
Attorneys for Defendant.

4.

Further answering defendant says that the injuries received by plaintiff's decedent which resulted in his death were proximately caused solely by his own negligence and but for his own negligence he would not have been injured or killed, all of which defendant stands ready to verify.

BEALL, KEMP & NAGLE,
W. I. GILBERT,
Attorneys for Defendant.

(Endorsed:) No. 14472. W. S. Berkshire, Admr. Est. of Wm. A. Linder, vs. Southern Pacific Company. Defendant's 1st Amended Original Answer. Filed this 10th day of Dec., A. D. 1917. C. M. McKinney, Clerk District Court, El Paso Co., Texas. M. E. Haynes, Deputy.

Defendant's Trial Amendment.

Filed Dec. 10, 1917.

In the District Court of El Paso County, Texas, 41st Judicial District. November Term, A. D. 1917.

No. 14472.

W. S. BERKSHIRE, Administrator,

vs.

SOUTHERN PACIFIC COMPANY.

Now comes the defendant, the Southern Pacific Company, and by leave of the Court files this its trial amendment, and said defendant specially excepts to that part of plaintiff's petition alleging defects in the engine on which deceased was engineer, and defects in the machinery and appliances, and excepts to paragraph five of said
12 petition, and especially that part thereof alleging that the engine was running hot, and that the appliances of said engine were running hot, and were out of repair, and the pin was hot and not properly fastened and were not oiled and greased, and were fastened too tight, for the reason that said allegations are too remote, do not show that the alleged defect in the machinery, the alleged hot pins, and the unoiled and ungreased condition of the engine and machinery would be the proximate cause of any injury to

the deceased, and said allegations are impertinent and scandalous, and of this defendant prays judgment of the court.

W. I. GILBERT,
BEALL, KEMP & NAGLE,
Attorneys for Defendant.

(Endorsed:) No. 14472. Berkshire, Admr., vs. Southern Pacific Co. Defendant's Trial Amendment. Filed this 10th day of Dec., A. D. 1917. C. M. McKinney, Clerk District Court, El Paso Co., Texas. M. E. Haynes, Deputy.

The Court's General Charge.

Filed Dec. 11, 1917.

In the District Court of El Paso County, Texas, 41st Judicial District, November Term, A. D. 1917.

No. 14472.

W. S. BERKSHIRE, Administrator,

vs.

THE SOUTHERN PACIFIC COMPANY.

GENTLEMEN OF THE JURY: This is a suit by W. S. Berkshire, temporary administrator and personal representative of the estate of William A. Linder, deceased, brought for the use and benefit of the surviving widow, Mrs. William A. Linder, and her three minor children, William, Eugene and Orville, against The Southern Pacific Company, defendant.

Plaintiff alleges in substance that William A. Linder, deceased, was killed on July 3rd, 1916, while in the employ of defendant as locomotive engineer near Carney, New Mexico. That while pulling a train West, and while occupying the usual and customary position in the cab of the engine he was struck on the head by a mail
13 crane or some obstruction maintained too close to the track, and so badly injured as to cause his death on or about the 11th day of July, 1916; That defendant was guilty of negligence in having said railway mail crane too near its track, and that such negligence proximately caused the death of the said William A. Linder. That the said William A. Linder, deceased, survived the accident about eight days, during which time he endured conscious pain and suffering. Plaintiff seeks to recover on behalf of the surviving widow and minor children the damages occasioned to them by the death of the said William A. Linder, and for the conscious pain and suffering alleged to have been endured by the deceased Linder prior to his death.

The defendant replies by a general denial, which puts in issue each and every allegation in plaintiff's petition contained. Further

pleading specially that the death of said William A. Linder, deceased, was due to risk and dangers assumed by him, and is not liable therefor.

As to the law of the case you are charged:

First.

You are the exclusive judges of the facts proved, the credibility of the witnesses, and the weight to be given to their testimony, but you are not the judges of the law. The law of the case you will take from this charge and the special or supplemental charges, if any, given you herewith.

Second.

In this case the burden of proof is on the plaintiff that is, before the plaintiff is entitled to recover he must establish all the facts necessary to a recovery by a preponderance of the evidence. "Preponderance of the evidence" means the greater weight of credible evidence.

Third.

All grounds of negligence alleged in plaintiff's petition which are not in this charge submitted to you, or any special charges, if any, are hereby specifically withdrawn from your consideration,
14 and you will not consider same for any purpose.

Fourth.

The terms "negligence" "ordinary care", and "proximate cause" will be used in subsequent portions of this charge, hence same are defined for your guidance:

"Negligence" is the doing of something which an ordinarily prudent person would not do under the same or similar circumstances, or in failing to do that which an ordinarily prudent person would do under the same or similar circumstances.

By "ordinary care" is meant such care as a person of ordinary prudence would commonly exercise under the same or similar circumstances.

By the term "proximate cause" is meant the direct, efficient or producing cause, without which the injury, if any, would not have occurred, and from which cause, unbroken by any new, intervening, independent cause it could have been reasonably anticipated by the party producing it that injury would result as a natural and probable consequence of the negligent act, if any, not necessarily the precise actual injury, but some like injury likely to result therefrom.

By the phrase "a risk ordinarily incident to the employment" as hereinafter used, is meant a risk that does not arise or grow out of an act of negligence on the part of the defendant, and when a risk is created by negligence on the part of a defendant it is not a risk ordinarily incident to the employment.

Fifth.

You are instructed that railway companies are not to be regarded as insurers of the safety of their employees, and when one enters the employment of a railway company as locomotive engineer he assumes all the risks that are ordinarily incident to the business, in which he is engaged, as well as all risks and dangers which are open and visible to his observation, and all risks and dangers of which he knew or which in the ordinary discharge of his duties he must necessarily have acquired the knowledge, but he may assume that the railway company will exercise ordinary care to provide for his use a reasonably safe place to work.

Sixth.

Now, if you believe from a preponderance of the evidence that on or about the third day of July, 1916, at or near Carney, New Mexico, William A. Linder, deceased, while engaged in his duties as a locomotive engineer of defendant was struck by a mail crane, and that the position of the mail crane was so near to the track as not to be reasonably safe for an engineer in his cab in the ordinary performance of his duty, and the defendant was guilty of negligence in so constructing and maintaining said crane in such close proximity to the track, if said crane was in such proximity to the track as not to be reasonably safe, and that such negligence, if any, was the proximate cause of the death of William A. Linder, then your verdict will be for the plaintiff, unless you should find for the defendant on other issues submitted as a defense in this charge, or special charges, if any.

Seventh.

Unless you believe from a preponderance of the evidence the defendant was guilty of negligence, and that such negligence was the proximate cause of the death of William A. Linder, your verdict will be for the defendant.

Eighth.

You are instructed that if you find from a preponderance of the evidence that the proximate cause of the death of the said William A. Linder, was from the ordinary risks and dangers incident to his employment, or that prior to the happening of the accident, deceased, William A. Linder, knew of the position of the crane which is alleged was so constructed and the location thereof, or that in the ordinary discharge of his duties must necessarily have known of same, and that he appreciated the danger thereof then and in such event you so find you are instructed that he assumed the risks, and your verdict will be for the defendant.

Ninth.

If you find for the plaintiff you will allow such sum as would be a fair and just compensation for the pecuniary loss, if any, resulting to Mrs. William A. Linder, and her minor children from the death of her husband. You will not, in estimating the damages, if any, consider the bereavement, mental anguish, grief or pain suffered by them on account of the death of the said William A. Linder. The damages are for p[illegible]uniary loss, not a solace. However, if you find from a preponderance of the evidence that prior to the death of the said William A. Linder, he endured conscious suffering, you may allow as damages such sum as you find from a preponderance of the evidence would be a fair and reasonable compensation for the conscious pain so suffered by said William A. Linder prior to his death. If you should find for the plaintiff on either or both of the elements of dangers submitted in this paragraph you will indicate in your verdict the amount allowed for such respective elements of damages.

In case you find for the plaintiff on the first item of damages submitted, that is, pecuniary loss suffered by the death of said William A. Linder, you will apportion such recovery between said Mrs. William A. Linder, William Eugene, and Orville Linder, indicating the sum allowed to each.

If you find for the plaintiff you may use the following form of verdict, after giving the number and style of the case:

"We the jury find in favor of the plaintiff and assess the pecuniary damages at the sum of $14,000.00 Dollars, apportioning the same as follows: To Mrs. William A. Linder Five Thousand Dollars; to William Linder, Three Thousand Dollars; to Eugene Linder Three Thousand Dollars and to Orville Linder Three Thousand Dollars (indicating the amount, if any, the each are entitled to.) And on the issue of damage for conscious suffering, we find in favor of plaintiff One Thousand Dollars. If you find in favor of the plaintiff on this issue then state how much, if in favor of the defend-
17 ant merely fill in the blank space with the word "defendant."

In case you find for the defendant, the form of your verdict will be: (After giving the number and style of the case) "We the jury find in favor of the defendant."

P. R. PRICE, *Judge.*

(Endorsed:) No. 14472. W. S. Berkshire, Admr., vs. The Southern Pacific Company. The Charge of the Court. Filed Dec. 11, 1917. C. M. McKinney, District Clerk.

Verdict.

Filed Dec. 12, 1917.

In the District Court of El Paso County, Texas, 41st Judicial District.

No. 14472.

W. B. BERKSHIRE, Administrator of the Estate of William A. Linder, Deceased,

vs.

SOUTHERN PACIFIC COMPANY.

We the jury find in favor of the plaintiff and assess the pecuniary damages at the sum of Fourteen Thousand Dollars ($14,000.00), apportioning the same as follows: To Mrs. William A. Linder Five Thousand Dollars ($5,000.00), to William Linder Three Thousand Dollars ($3,000.00), to Eugene Linder Three Thousand Dollars ($3,000.00), and to Orville Linder Three Thousand Dollars ($3,000.00). And on the issue of damage for conscious suffering we find in favor of plaintiff, One Thousand Dollars ($1,000.00).

(Signed) J. L. FOSTER, *Foreman.*

(Endorsed:) 14472. W. S. Berkshire, Admr. of Est. of W. A. Linder, vs. S. P. Ry. Co. Verdict. Filed Dec. 12, 1917. C. M. McKinney, District Clerk.

Judgment Bk. 13, pg. 332.

In the District Court of the 41st Judicial District in and for El Paso County, Texas, November Term, 1917.

18 No. 14472.

W. S. BERKSHIRE, Administrator of the Estate of Wm. A. Linder, Deceased,

vs.

SOUTHERN PACIFIC COMPANY.

Be it remembered that on this the 10th day of December, A. D. 1917, came on to be heard the above styled and numbered cause, and all parties appeared and announced ready for trial, whereupon came a jury consisting of J. L. Foster and eleven others, all good and lawful men, all duly empaneled, qualified and sworn, who after hearing all the evidence, the law as given them in charge by the Court and argument of counsel, retired to consider of their verdict, and subsequently on the evening of the 10th day of December, 1917, returned into open court the following verdict, to-wit:

"In the District Court of El Paso County, Texas, 41st Judicial District.

No. 14472.

W. S. BERKSHIRE, Administrator of the Estate of William A. Linder, Deceased,

vs.

SOUTHERN PACIFIC COMPANY.

We, the jury find in favor of the plaintiff and assess the pecuniary damages at the sum of Fourteen Thousand Dollars ($14,000.00), apportioning the same as follows:

To Mrs. William A. Linder, Five Thousand Dollars ($5,000.00), to William Linder Three Thousand Dollars ($3,000.00), to Eugene Linder Three Thousand Dollars ($3,000.00) and to Orville Linder Three Thousand Dollars ($3,000.00).

And on the issue for conscious suffering we find in favor of plaintiff, One Thousand Dollars ($1,000.00).

(Signed) J. L. FOSTER, *Foreman.*"

It is, therefore, the order, judgment and decree of the Court that said W. S. Berkshire, as temporary administrator and personal representative of the estate of Wm. A. Linder, deceased, do have and recover of and from the defendant, the Southern Pacific Company, the sum of Fifteen Thousand Dollars ($15,000.00) for the use
19 and benefit of the surviving wife and children and for the benefit of the estate of said deceased, as set out in said verdict, together with interest thereon from this date at the rate of 6% per annum, and together with all costs in this behalf expended, for all of which let execution issue.

Defendant's Exceptions and Objections to the Court's Charge and Bill of Exception.

Filed Dec. 11, 1917.

In the District Court of El Paso County, Texas, 41st Judicial District.

No. 14472.

W. S. BERKSHIRE, Administrator of the Estate of William A. Linder, Deceased,

vs.

SOUTHERN PACIFIC COMPANY.

Now comes the Southern Pacific Company, defendant in the above numbered and entitled cause, after the close of all of the evidence in

the case, and within a reasonable time after the Court had submitted to its attorneys his general charge and before the reading of said general charge, or any other charge to the jury and makes the following exceptions and objections to said general charge:

I.

The defendant objects and excepts to said charge as a whole in submitting any issue of negligence to the jury because there is no evidence of any negligence on the part of the defendant proximately causing any injury to the deceased, Linder, which resulted in his death.

The defendant further excepts and objects to said main or general charge because the same submits to the jury issues of negligence on the part of the defendant, when the undisputed evidence shows that the injuries received by deceased, Linder, were directly and proximately wholly caused by his own negligence, and without any negligence on the part of the defendant.

The defendant further objects and excepts to said charge because the same submits the issue of assumed risk when the undisputed evidence shows the injuries received by the deceased, Linder, were the result of risks incident to his employment, and risks that did not arise or grow out of any — of negligence on the part of the defendant, and because the law is that the deceased assumed all the risks ordinarily incident to the business in which he was engaged, that is, the business of an engineer, as well as all risks and dangers which are open and visible, and risks and dangers which he knew of or which in the ordinary discharge of his duty he must necessarily have acquired knowledge of. And the undisputed evidence in this case shows that any injuries that the deceased received were the result and risk assumed by him, and there was no issue of fact to submit to the jury, and no issue of assumed risk to submit to the jury.

The defendant objects and excepts to the sixth paragraph of said charge in telling the jury that they might return a verdict for the plaintiff if they believe from a preponderance of the evidence that the deceased, Linder, while working as an engineer, was struck by a mail crane, and that the position of the mail crane was so near the track as not to be reasonably safe for the engineer in his cab in the ordinary performance of his duties, and the defendant was guilty of negligence in so constructing and maintaining said crane in such close proximity to the track, because the undisputed evidence shows that the mail crane was a standard mail crane, of uniform size, class, position and location, and fails to show any negligence on the part of the defendant in erecting and maintaining said mail crane in the place it was erected and maintained. And the Court erred in giving paragraph six of said charge instead of instructing the jury to return a verdict in favor of the defendant.

The defendant objects to the 9th paragraph of said charge because the Court instructs the jury that if they find for the plaintiff they will allow a sum of money as would be fair and just compensation

for the pecuniary loss to Mrs. Linder and her minor children for the death of her husband, because the same gives the right to the
21 jury to return a verdict for the plaintiff, and assess damages against this defendant when the undisputed evidence is that the injuries received by the said deceased were wholly proximately caused by his own negligence, and not caused by the negligence of this defendant, and the undisputed evidence shows that any injuries that the deceased, Linder, received were the result of risks assumed by him, while in the operation of an engine propelling a train engaged in interstate commerce.

The defendant objects to that portion of paragraph nine of the charge authorizing the jury to return a verdict for conscious pain suffered by deceased Linder, because the evidence is undisputed that he was not conscious and suffered no conscious pain.

Defendant objects to said charge in submitting any issue of negligence on the part of defendant, and telling the jury that under certain circumstances plaintiff might recover because the undisputed evidence is that the deceased Linder was operating an engine and train at the time of his alleged injuries, engaged in interstate commerce, and that under the law and the facts of this case deceased assumed all the risks incident to his work at the time and place, and the jury should have been instructed to return a verdict in favor of the defendant.

The foregoing objections were submitted to me after the close of all the evidence in the case and within a reasonable time after the Court had prepared and submitted to plaintiff and defendant his general charge, and before said general charge, or any other charge, was read to the jury, and same being considered by me was by me, then and there, and is here now held not good and said objections and exceptions are hereby overruled, to which action of the Court in holding said objections not good and overruling the same, defendant, then and there, in due and proper time, before the reading of said general charge, or any other charge to the jury, in open court excepted for all of the reasons stated in said objections and ex-
22 ceptions, and here now tenders the foregoing objections and exceptions, together with the exceptions herein contained, as its bill of exceptions and asks that the same be allowed, which is accordingly done, after said objections and exceptions were submitted to the attorneys for the plaintiff for examination, on this 11th day of December, A. D. 1917.

P. R. PRICE,
Judge District Court, El Paso County, Texas, 41st Judicial District.

(Endorsed:) No. 14472. In the District Court of El Paso County, Texas, 41st Judicial District. W. S. Berkshire, Administrator of the Estate of William A. Linder, deceased, vs. Southern Pacific Company. Defendant's Exceptions and Objections to the Court's Charge and Bill of Exception. Filed Dec. 11, 1917. C. M. McKinney, District Clerk.

Defendant's Exception to Action of Court in Refusing Its Special Charge.

Filed Dec. 13, 1917.

In the District Court of El Paso County, Texas, 41st Judicial District, November Term, A. D. 1917.

No. 14472.

W. S. BERKSHIRE, Administrator,

vs.

THE SOUTHERN PACIFIC COMPANY.

Be it remembered, that on the trial of the above numbered and entitled cause, after disposing of all issues in the case, and after the defendant's motion for an instructed verdict and within a reasonable time after the Court had prepared and delivered to plaintiff and defendant the Court's general charge, and before reading its general charge or any other charge to the jury, the defendant requested the Court to give defendant's special charge Number one which charge was by the Court refused to which action of the Court the defendant then and there in open court excepted for the following reasons, to-wit:

Because there is no evidence that the defendant was guilty of negligence proximately causing the injury and death of the de-
23 ceased.

2nd. Because the undisputed evidence shows that the crane in question was constructed in the usual and customary way, and a safe distance from the track, and that the deceased was an experienced engineer, and had been running over the road in question for a number of years, and was familiar with the location and condition of the crane in question, and knew and appreciated the dangers incident thereto, and because the undisputed evidence shows that he came to his death while engaged in interstate commerce, and his death was caused by risks and dangers assumed by him for which the defendant was not liable.

3rd. Because the undisputed evidence shows that the deceased came to his death by the negligence of no one and by no negligence of defendant, but that it was the result of his own negligence, and the uncontroverted evidence shows the defendant had exercised ordinary care to provide a safe place for deceased to work, and because the uncontroverted evidence shows that such appliance was in proper condition and place.

The defendant thereupon presented to the Court its further special charges all of which were presented after the refusal of special charge Number One, and thereupon the Court refused defendant's special charge Number four asked by the defendant, after same had been

submitted to attorneys for plaintiff, and the Court endorsed his refusal thereon, to which action of the Court the defendant then and there in open court excepted for the reasons stated in said special charge, and because the Court had submitted evidence in connection with the defect of the engine therein specified and had refused to instruct the jury to disregard said evidence, and because there was no evidence in regard to the alleged defect presented in said charge, which should go to the jury.

P. R. PRICE, *Judge.*

(Endorsed:) No. 14,472. Berkshire, Admr. for Linder, vs. Southern Pacific Co. Defendant's Exception to action of Court in
24 refusing its special charges. Filed this 11 day of December, A. D. 1917. C. M. McKinney, Clerk District Court, El Paso, Texas. E. M. Montes, Deputy.

Defendant's Motion to Strike Out Testimony.

Filed Dec. 10, 1917.

No. 14472.

W. S. BERKSHIRE, Administrator,

vs.

SOUTHERN PACIFIC COMPANY.

Now comes defendant and moves the Court to strike out all of the testimony of the witness Joe Grant, with reference hot pins on locomotive engines, and the causes of the driving pins being made hot, because said testimony is too remote and does not show the condition of the pins to have been the proximate cause of any injury to deceased Linder, and said testimony is immaterial, irrelevant and without pleading to support it, and defendant moves the Court to withdraw said testimony from the jury and instruct them not to consider same.

BEALL, KEMP & NAGLE,
W. I. GILBERT,
Attorneys for Defendant.

(Endorsed:) No. 14,472. Berkshire, Admr. for Linder, vs. S. P. Co. Defendant's Motion to strike out Testimony. Filed Dec. 10th, 1917. C. M. McKinney, Clerk Dist. Court, El Paso Co.

Defendant's Special Chg. No. 1.

Filed Dec. 11, 1917.

In the District Court of El Paso County, Texas, 41st Judicial District.

No. 14472.

W. S. BERKSHIRE, Administrator of the Estate of William A. Linder, Deceased,

vs.

SOUTHERN PACIFIC COMPANY.

Special Charge Number One Requested by the Defendant.

GENTLEMEN OF THE JURY: In this case you are instructed to return a verdict in favor of the defendant, Southern Pacific Company.

BEALL, KEMP & NAGLE &
23 W. I. GILBERT,
Attorneys for Defendant, Southern Pacific Company.

Dec. 11, '17.

Refused.
P. R. PRICE, *Judge.*

(Endorsed:) No. 14,472. In the District Court of El Paso County, Texas, 41st Judicial District. W. S. Berkshire, Administrator of the Estate of William A. Linder, deceased, vs. Southern Pacific Company. Special Charge Number One, requested by defendant. Filed Dec. 11, 1917. C. M. McKinney, District Clerk.

Defendant's Special Charge No. 2.

Filed Dec. 11, 1917.

In the District Court of El Paso County, Texas, 41st Judicial District.

No. 14472.

W. S. BERKSHIRE, Administrator of the Estate of William A. Linder, Deceased,

vs.

SOUTHERN PACIFIC COMPANY.

Special Charge Number Two Requested by the Defendant After the Court Had Refused Defendant's Special Charge Number One.

GENTLEMEN OF THE JURY: You are instructed that you can in no wise consider any evidence as to any alleged defect in the engine in question, or its equipment, as a ground of liability against the defendant.

BEALL, KEMP & SAGLE,
W. I. GILBERT,
Attorneys for Defendant, Southern Pacific Company.

Given.
P. R. PRICE, *Judge.*

(Endorsed:) No. 14472. W. S. Berkshire, Admr. Wm. A. Linder Est., vs. Southern Pacific Company. Defendant's Special Charge No. 2. Filed Dec. 11, 1917. C. M. McKinney, District Clerk.

26 *Defendant's Special Charge No. 3.*

Filed Dec. 11, 1917.

In the District Court of El Paso County, Texas, 41st Judicial District.

No. 14472.

W. S. BERKSHIRE, Administrator of the Estate of William A. Linder, Deceased,

vs.

SOUTHERN PACIFIC COMPANY.

Special Charge Number Three Requested by the Defendant After the Court Had Refused Defendant's Special Charge Number One.

GENTLEMEN OF THE JURY: You are instructed that the defendant Company only owed the deceased Linder ordinary care to furnish him a reasonably safe place to work and only owed him ordinary care in the erection and location of a mail crane; and you are charged that it was plaintiff's duty to exercise ordinary care, that is to say the care that a reasonably prudent man would have exercised under the same or like circumstances in operating an engine over the line of defendant's road as deceased Linder was doing, and the failure of said deceased Linder, if he did fail to exercise such care would be negligent on his part. Now, if you believe from the evidence, that the deceased Linder failed to exercise such care as a reasonably prudent person would have exercised under the same or similar circumstances in putting his head out of the cab of the engine while passing the mail crane, and in doing so was struck by the crane and such failure on his part to use such care was the sole proximate cause of the injuries to deceased and his subsequent death, then you are instructed that plaintiff cannot recover and your verdict — be with the defendant.

BEALL, KEMP & NAGLE,
W. I. GILBERT,
Attorneys for Defendant, Southern Pacific Company.

Given.
P. R. PRICE, *Judge.*

(Endorsed:) No. 14,472. W. S. Berkshire, Admr. Est. of Wm. A. Linder, decd., vs. Southern Pacific Co. Special Charge No. 3 asked by deft. Filed Dec. 11, 1917. C. M. McKinney, District Clerk.

27 *Defendant's Special Chg. No. 4.*

Filed Dec. 11, 1917.

In the District Court of El Paso County, Texas, 41st Judicial District, November Term, A. D. 1917.

No. 14472.

W. S. BERKSHIRE, Administrator,

vs.

SOUTHERN PACIFIC COMPANY.

After the defendant's special charge Number one had been requested and been refused by the Court, the defendant presented the following special Charge No. 4 and requested that the same be given to the jury:

GENTLEMEN OF THE JURY: You are instructed that you will not consider any evidence of the defects in the engine of a hot box or hot driving pin, or any evidence as to the driving pin not being properly fastened, or lubricated, or oiled or greased, and any issue of negligence on the part of the defendant by reason of the defective engine is specifically withdrawn from you.

W. I. GILBERT,
BEALL, KEMP & NAGLE,
Attorneys for Defendant.

Refused.
December 11th, 1917.
P. R. PRICE, *Judge.*

(Endorsed:) 14472. Berkshire, Admr., vs. S. P. Co. Defendant's Special Chg. No. 4. Filed Dec. 11th, 1917. C. M. McKinney, Dist. Clerk, El Paso Co., Tex.

Defendant's Motion for a New Trial.

Filed Dec. 12, 1917.

In the District Court of El Paso County, Texas, 41st Judicial District.

No. 14472.

W. S. BERKSHIRE, Administrator of the Estate of William A. Linder, Deceased,

vs.

SOUTHERN PACIFIC COMPANY.

Now comes the defendant, Southern Pacific Company and moves the Court to set aside the verdict heretofore rendered in the above styled and numbered cause and grant it a new trial, for the following reasons, to-wit:

28 1.

The Court erred in overruling the defendant's special exception to that part of plaintiff's petition alleging defects in the engine and defects in the machinery and appliances, that part of the petition alleging that the engine was running hot and was out of repair and that the pin was hot and not properly fastened.

2.

The Court erred in refusing to give defendant's Special Charge Number One, which, omitting its formal parts, is as follows:

"GENTLEMEN OF THE JURY: In this case you are instructed to return a verdict in favor of the defendant, Southern Pacific Company."

3.

The Court erred in refusing to give Defendant's Special Charge Number One, which, omitting its formal parts, is as follows:

"GENTLEMEN OF THE JURY: In this case you are instructed to return a verdict in favor of the defendant, Southern Pacific Company." For the reason that the undisputed evidence shows that any injuries which the deceased Linder received were the result of risks and dangers ordinarily incident to his employment as engineer, while operating one of defendant's engines and trains engaged in Interstate Commerce, which risks and dangers he assumed.

4.

The Court erred in refusing to give defendant's Special Charge Number One, which, omitting its formal parts, is as follows:

"GENTLEMEN OF THE JURY: In this case you are instructed to return a verdict in favor of the defendant, Southern Pacific Company," because the undisputed evidence shows that if the deceased Linder received any injuries, that the same were wholly proximately caused by his own negligence in placing his head too far out
29 of the cab of the engine and in placing his body and head in such position as to be struck by the mail crane.

5.

The Court erred in over-ruling and refusing to grant Defendant's motion made after all the evidence in the case had been introduced and both parties had closed the case, for an instructed verdict, because the undisputed evidence shows that defendant Company was guilty of no negligence proximately resulting in the death of the deceased Linder, and because the undisputed evidence shows that the injuries received by deceased Linder, resulting in his death while engaged in operating a train engaged in Interstate Commerce, was the result wholly of his own negligence and were proximately caused by his own negligence in not keeping a proper look-out for the mail crane and in leaning out of his engin*g* too far at the station of Carney, New Mexico, and in placing himself in a perilous position, causing his head to strike the mail crane while passing the same; and because the undisputed evidence shows that any injury which deceased Linder received while operating a train engaged in Interstate Commerce was the result of risks incident to his employment as an engineer, which risks he assumed; and because the evidence shows that the mail crane in question was situated and located a reasonably safe distance from the track and from the cab of passing engines; and because the law only required the Railway Company to exercise ordinary care in providing a safe place for the said Linder to work and operate his engine, and the evidence shows that the Railway Company exercised ordinary care in this case to provide said Linder a safe place to work, and exercised ordinary care in placing the mail crane in question a reasonably safe distance from the track and from the cab of passing engines similar to that operated by the deceased Linder.

6.

The Court erred in refusing to give Defendant's Special Charge Number Four, which, omitting its formal parts, is as follows:

30 "GENTLEMEN OF THE JURY: You are instructed that you will not consider any evidence of the defects in the engine of a hot box or hot driving pin, or any evidence as to the driving pin not being properly fastened, or lubricated, or oiled or greased, and

any issue of negligence on the part of the defendant by reason of the defective engine is specifically withdrawn from you."

7.

The Court erred in his main, or general charge to the jury as a whole in submitting any issue of negligence to the jury, because there is no evidence of any negligence on the part of defendant proximately causing any injury to deceased Linder, which resulted in his death.

8.

The Court erred in submitting any issue of negligence on the part of the defendant, because the undisputed evidence shows that the injuries received by deceased Linder were directly and proximately wholly caused by his own negligence and without any negligence on the part of the defendant.

9.

The Court erred in his main or general charge in submitting to the jury the issue of assumed risk, because the undisputed evidence shows that the injuries received by the deceased Linder were the result of risks incident to his employment while engaged in operating a train engaged in Interstate Commerce and risks that did not arise or grow out of any negligence on the part of defendant.

10.

The Court erred in submitting any issue of assumed risk to the jury, because the deceased Linder assumed all the risks ordinarily incident to the business in which he was engaged, that is, the business of an engineer, as well as all the risks and dangers which were open and visible and risks and dangers which he knew of, or which in the ordinary discharge of his duty he must necessarily have acquired a knowledge of; and the undisputed evidence
31 shows that any injuries that deceased Linder received were the result of risks assumed by him, and there was no issue of fact to submit to the jury, and no issue of assumed risk to submit to the jury.

11.

The Court erred in the sixth paragraph of his charge, which is as follows:

"Now, if you believe from a preponderance of the evidence that on or about the third day of July, 1916, at or near Carney, New Mexico, William A. Linder, deceased, while engaged in his duties as a locomotive engineer of defendant was struck by a mail crane and that the position of the mail crane was so near to the track as not to be reasonably safe for an engineer in his cab or in the ordi-

nary performance of his duty, and the defendant was guilty of negligence in so constructing and maintaining said crane in such close proximity to the track, if said crane was in such proximity to the track as not to be reasonably safe, and that such negligence, if any, was the proximate cause of the death of William A. Linder, then your verdict will be for the plaintiff, unless you should find for the defendant on other issues submitted as a defense in this charge, or special charges, if any."

Because the Court tells the jury that if they believe from the preponderance of the evidence that the deceased Linder, while working as an engineer, was struck by a mail crane and that the position of the mail crane was so near the track as not to be reasonably safe for the engineer in his cab in the ordinary performance of his duty, and the defendant was guilty of negligence in so constructing and maintaining said crane in such close proximity to the track; because the undisputed evidence shows that the mail crane was a standard mail crane of uniform size, class, position and location and fails to show any negligence on the part of defendant in erecting and maintaining said mail crane in the place it was erected and maintained.

32 12.

The Court erred in Paragraph Nine of his said charge, which is as follows:

"If you find for the plaintiff you will allow such sum as would be a fair and just compensation for the pecuniary loss, if any, resulting to Mrs. William A. Linder, and her minor children from the death of her husband. You will not, in estimating the damages, if any, consider the bereavement, mental anguish, grief or pain suffered by them on account of the death of the said William A. Linder. The damages *for* for pecuniary loss, not a solace. However, if you find from a preponderance of the evidence that prior to the death of the said William A. Linder, he endured conscious suffering, you may allow as damages such sum as you find from a preponderance of the evidence would be a fair and reasonable compensation for the conscious pain so suffered by said William A. Linder prior to his death. If you should find for the plaintiff on either or both of the elements of damages submitted in this paragraph you will indicate in your verdict the amount allowed for such respective elements of damages.

"In case you find for the plaintiff on the first item of damages submitted, that is, pecuniary loss suffered by the death of said William A. Linder, you will apportion such recovery between said Mrs. William A. Linder, William, Eugene and Orville Linder, indicating the sum allowed to each.

"If you find for the plaintiff you may use the following form of verdict, after giving the number and styled of the case: 'We, the jury, find in favor of the plaintiff and assess the pecuniary damages at the sum of — Dollars, apportioning the same as follows: To Mrs. William A. Linder — Dollars, to William Linder — Dollars, to

Eugene Linder — Dollars and to Orville Linder — Dollars. (Indicating the amount, if any, that each are entitled to.) And on the issue of damage for conscious suffering, we find in favor — (If you find in favor of the plaintiff on this issue then state
33 how much, if in favor of the defendant, merely fill in the blank space with the word 'defendant.' In case you find for the defendant, the "form of your verdict will be: (After giving the number and style of the case) 'We the jury find in favor of the defendant.'"

Because the same gives the jury a right to return a verdict for the plaintiff and assess damages against the defendant, when the undisputed evidence is that the injuries received by deceased Linder were wholly proximately caused by his own negligence and not caused by any negligence of this defendant, and the undisputed evidence shows that any injuries that deceased Linder received were the result of risks assumed by him while in the operation of an engine engaged in Interstate Commerce.

13.

The Court erred in the Ninth Paragraph of said charge in authorizing the jury to return a verdict for conscious pain suffered by deceased Linder, because the evidence is undisputed that he was not conscious and suffered no conscious pain, and there is no evidence that he was conscious or suffered conscious pain.

14.

The verdict of the jury is contrary to the law, because there is no issue to submit to the jury and the undisputed evidence shows that plaintiff's injuries were the result of risks and dangers assumed by him in doing the work he was doing at the time and place.

15.

The verdict of the jury is contrary to the evidence, because the undisputed evidence shows that, prior to the happening of the said accident, the deceased Linder knew of the position of the crane and its proximity to the track and shows that if he did not so know that in the ordinary discharge of his duty, he must necessarily have known of the same, and appreciated the danger thereof.

34 16.

The amount of the verdict returned by the jury is unconscionable, excessive and outrageous and is not the result of fair deliberation on the part of the jury, but shows that it is a result either of passion or prejudice on the part of the jury against this defendant, or sympathy for the widow and children of deceased.

17.

The verdict of the jury is grossly excessive and unconscionable, because the evidence shows that the deceased Linder was earning only $200.00 a month and was 43 years of age, and there is no evidence of his life expectancy, and there is no evidence before the jury as to what he would probably earn and as to what the said wife and children would receive of his earnings.

Wherefore, this defendant prays that this motion be granted and the judgment heretofore rendered be set aside.

BEALL, KEMP & NAGLE,
Attorneys for Defendant,
Southern Pacific Company.

(Endorsed:) 14,472. W. S. Berkshire, Admr. for Linder, vs. Southern Pacific Co. Defendant's Motion for a New Trial. Filed this 12 day of Dec., A. D. 1917. C. M. McKinney, Clerk District Court, El Paso Co., Texas. M. E. Haynes Deputy.

Order of Court Overruling Defendant's Motion for a New Trial.

Bk. 13, pg. 339.

In the District Court of El Paso County, Texas, 41st Judicial District.

No. 14472.

W. S. BERKSHIRE, Administrator of the Estate of William A. Linder, Deceased,

vs.

SOUTHERN PACIFIC COMPANY.

Be it remembered that on this, the 4th day of January, A. D. 1918, came on to be heard defendant's motion for a new trial in the above styled and numbered cause, and the same having been heard and considered by the Court is in all things overruled, to
35 which action of the Court in overruling said motion the defendant, Southern Pacific Company, in open court excepted and gave notice of appeal to the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas at El Paso. For good cause shown, the defendant is given eighty (80) days from and after the adjournment of this term of court in which to prepare and have approved and filed its statement of facts and bills of exception, and a memorandum to this effect is made on the docket of this court.

Supersedeas Bond on Appeal.

Filed Jany. 21st, 1918.

In District Court, El Paso County, Texas, 41st Judicial District, November Term, A. D. 1917.

No. 14472.

W. S. BERKSHIRE, Admr. Estate of Wm. A. Linder, Deceased,

vs.

SOUTHERN PACIFIC COMPANY.

Whereas, in the above entitled and numbered cause, pending in the District Court of El Paso County, Texas, 41st Judicial District, at a regular term of said Court, to-wit, on the 11th day of December, A. D. 1917, the said W. S. Berkshire as Temporary Administrator of the Estate of Wm. A. Linder, deceased, recovered judgment against the said Southern Pacific Company for the sum of Fifteen Thousand Dollars *Dollars*, apportioned as follows: $5000.00 to the wife of said Linder, $3000.00 each to each of the three children of said Linder and $1000.00 for conscious pain suffered by said Linder, besides costs of suit from which judgment the said Southern Pacific Company has taken an appeal to our Court of Civil Appeals for the Eighth Supreme Judicial District of the State of Texas at El Paso;

Now, therefore, we, the said Southern Pacific Company as principal, and C. R. Morehead & Geo. D. Flory as sureties, acknowledge ourselves bound to pay to the said W. S. Berkshire as Temporary Administrator of the Estate of William A. Linder, deceased the sum of

Thirty Two Thousand Dollars,

36 Conditioned, that the said Southern Pacific Company appellant, shall prosecute its appeal with effect, and in case the judgment of the Supreme Court, or the Court of Civil Appeals, shall be against it that it shall perform its judgment sentence or decree, and pay all such damages as said court may award against it.

Witness our hands, this 21st day of January, A. D. 1918.

SOUTHERN PACIFIC COMPANY,
By BEALL, KEMP & NAGLE, *Attys.*,
Principal.

C. R. MOREHEAD.
GEO. D. FLORY.

Approved the 21 day of Jan. A. D. 1918.

C. M. McKINNEY,
Clerk District Court, El Paso County.
By E. M. MONTES, *Deputy.*

I fix the probable amount of the costs of suit at $300.

C. M. McKINNEY,
Clerk District Court, El Paso County,
By E. M. MONTES, *Deputy.*

(Endorsed:) No. 14472. In District Court, El Paso County, Texas, November Term, A. D. 1917. W. S. Berkshire, Admr. Estate Linder vs. Southern Pacific Co. Supersedeas Bond on Appeal. Filed the 21st day of January, 1918. C. M. McKinney, Clerk District Court, El Paso County, by E. M. Montes Deputy.

37 THE STATE OF TEXAS:

No. 14472.

W. S. BERKSHIRE, Administrator, Plaintiff,

vs.

THE SOUTHERN PACIFIC COMPANY, Defendant.

Clerk's Fees.

Docketing Cause	$.20
Filing paper- (21)	3.15
Entering Appearances (2)	.30
Docketing Motions (4)	.60
1 Citation and 1 copy	1.25
Oaths without certificates	.50
Swearing and Empaneling jury	.35
Receiving and Recording Verdict	.35
Entering Sheriff's Return on Citation	.50
Approved 1 Bonds	1.50
4 Subpenas	1.00
Swearing 11 Witnesses	1.10
Entering 7 orders	5.25
Judgment	1.00
Taxing Costs and Copy	.25
Transcript of Court of Appeals	20.70
Total Clerk's Fees	$38.00

Sheriff's Fees.

Executing Citations and Mileage	$.85
Summoning Witnesses and Mileage	1.50
Jury Fee	.50
Total Sheriff's Fee	$2.85

Recapitulation.

Jury Fee	$5.00
Stenographer's Fee	3.00
Witness Fee	1.00
Clerk's Fees	38.00
Total Costs	$49.85
Due	$49.85

THE STATE OF TEXAS,
County of El Paso:

I hereby certify the above to be a correct account of the Costs in the above entitled and numbered suit, up to this date.

Witness my hand and seal of said Court, affixed at office in El Paso, Texas, this 4th day of February, 1918.

Attest:

[SEAL.] C. M. McKINNEY,
Clerk District Court, El Paso County.
By M. E. HAYNES, *Deputy.*

38 *Clerk's Certificate.*

THE STATE OF TEXAS,
County of El Paso:

I, C. M. McKinney, Clerk District Court in and for El Paso County, Texas, 41st Judicial District, do hereby certify that the foregoing transcript of 34-1/2 pages contains a true and correct copy of all proceedings had in cause No. 14472, wherein W. S. Berkshire, Administrator of the Estate of Wm. A. Linder, deceased, is plaintiff and the Southern Pacific Company is defendant, as the same appears of record in my office.

Given under my hand and the seal of said Court at office in El Paso County, Texas, this the 4th day of February, 1918.

[SEAL.] C. M. McKINNEY,
Clerk District Court, El Paso County, Texas,
41st Judicial District,
By M. E. HAYNES, *Deputy.*

(Endorsed:) No. 891. Southern Pacific Co., Appellant, vs. W. S. Berkshire, Admr., Appellee. From the District Court, El Paso County, Forty First Judicial District. Applied for by Beall, Kemp & Nagle on the 4th day of January, 1918, and delivered to Beall, Kemp & Nagle on the 7th day of Feby., 1918. C. M. McKinney, Clerk of the District Court, El Paso County, by M. E. Haynes, Deputy. Court of Civil Appeals, El Paso, Texas. Filed Apr. 5, 1918. J. J. Driscoll, Clerk.

Filed in the Court of Civil Appeals, El Paso, Texas, Apr. 5, 1918.
J. I. Driscoll, Clerk.

In the District Court of El Paso County, Texas, 41st Judicial District.

No. 14472.

W. L. BERKSHIRE, Administrator, Estate of W. A. Linder, Deceased,

vs.

SOUTHERN PACIFIC COMPANY.

Be it remembered that on the trial of the above styled and numbered cause, the following was all the oral and documentary evidence introduced:

CHARLES ANDERSON, a witness for the Plaintiff, being duly sworn, testified as follows:

My name is Charles Anderson. I am a brakeman for the Southern Pacific. I was working as extra brakeman for the Southern Pacific on July 3, 1916, the train was going from El Paso, Texas, to Lordsburg, New Mexico. O'Brien was in charge of the train as conductor, Linder as engineer, Taylor was fireman, and I was head brakeman. In leaving El Paso, we had a soldier train, with regular passenger coaches. Passenger coaches are parallel with the sides of the cab of the engine. Something occurred on that trip with reference to the engine. Yes, I am working for the Southern Pacific now. Well, what occurred was this, Linder got out to see about a pin on the engine that was running hot, the main driving pin. It first began to run hot about a mile out of Carney, that is approximately 45 miles from El Paso. We first discovered it, not knowing whether it was on his side or the fireman's, at Mindus. By noticing the smell of the pin being hot, he knew something was running hot, on what side, he didn't know. We didn't stop at Mindus, just slowed up to let 102 go on the sidetrack. That was about six miles from where the accident occurred. There was light, dim smoke on the engineer's side from this driving pin. It run hotter to about a mile from Carney, when Linder stepped out. I seen him get out on the running board, which is placed for that purpose, and get on his hands and knees and look to see if it was getting hotter. Afterwards, I seen him get up and start through the cab. At that time I looked back, I was looking back at the side of the train, trying to discover the hot box. I was standing up with my hands on both grab irons, right and left, in the gangway, looking out down the side of the train. Just then this mail sack fell. At the time it fell, either the crane or the sack knocked my hat from the left to the right side, and I got this drop of blood on my face. Linder was unconscious, with

his right arm and pretty near half of his body outside of the cab, leaning with the right side and arm over the arm rest of the engine. I should judge that at that time, my head was out about 14 inches from the side of the engine tank and cab. Some blood was thrown on the left side of my face, I had my left side out. My head was out from 10 to 14 inches, I can't judge exactly myself, it would have to extend that far in order to see down the side of the train. My whole body was in the cab. At the time my hat was struck, I felt the blood and noticed the sack going down at the same time, and the blood hit me on the side of my face. When I turned around to Mr. Linder, he had a cut on the right side, above the ear, about an inch over the right ear, to my knowledge. I shut the throttle off and started applying the brakes. The fireman was on the side where he belonged, setting the injector. The first thing that attracted my attention to the accident was noticing the sack, after it struck my hat. After the sack fell, I reached up and felt the blood, there was some on my glove also. That wasn't blood I had lost, it didn't scratch me, just struck my hat.

Cross-examination:

My hat was misplaced either by the mail sack or the point of the crane, I was standing between the engine and the tank, and had hold of the handholds, one on each side and was looking back,
41 leaning out over the side of the cab. I don't see how I could have extended out over 14 inches, for the simple reason * * * Yes, sir, I am about six feet tall. I suppose I could have swung out a foot and a half. I was looking back. I know it struck him. No, I didn't see it strike him, and I wasn't looking in that direction at the time. I had been looking back down the side of the train for at least two minutes. I hadn't been looking in Mr. Linder's direction for two minutes, or about that length of time, he was at that time starting to come in through the cab window. The last time I saw him he hadn't gotten entirely in the cab window, he was getting ready to prepare himself to go in through the cab window. The last position I saw him in, he was standing right in front of the cab window outside, figuring on going in, whether he started in or not, I don't know. I know he went in, on account of what the fireman said. No, I didn't see him inside the cab prior to the time he was struck. As I told you, the last position I saw him in, was standing straight up on the running board outside the cab window. I have been up and down that division for the last seven years, not in the train service, part of the time I was stationary engineer. I have known that crane to be there over eight years, myself. I don't know what length of time Mr. Linder had been running over that division, but a number of years. This crane stands on the same basis as any other. It is like all the balance of them. I never measured the distance it was from the track, but I should judge 14 inches from the parallel part of the cab,—4 inches for the arm rest, and 9 or 10 to the point of the crane, maybe more or less—but 14 inches from the parallel part of the cab to the crane. The engine was going west, and Mr. Linder was on the north side, and he was struck on

the right side, about an inch above the right ear. The cab window and the coach line behind are supposed to be parallel. As far as I could tell, this was an ordinarily constructed engine, and the
42 outside wall of the cab and the outside wall of the coach following were parallel. Mr. Linder had to have his head partly out of the cab window to be struck. In order to get in position in his seat, I would judge he would have to be in that position. It don't take much to get 14 inches out, but, certainly, for anything to hit it it would have to be out 14 inches.

Redirect examination:

My body wasn't outside. I was leaning out, and my head, I should judge, was 14 inches outside of the parallel part of the tank and cab. Allowing 4 inches for the arm rest and 10 from the edge of the arm rest to the end of the crane, makes 14 inches. That is just an estimate, it may be 15, 18 or 19, I don't know. When I found Mr. Linder he was sitting in his seat, with his arm and head out of the cab, dropped over. Engineers sit right in the engineer's seat when they are operating the engine, and when I found him in the condition I did, he was sitting on the seat box. There is nothing at Carney but a sidetrack and a section house. There are no obstructions other than the mail crane on the right-hand side of this track at Carney, except a tool house, and that sits, I would judge, 12 feet away from the track. That is all outside of the signboard, for the station, and that is 18 to 25 feet from the track. We took Mr. Linder to Deming.

Recross-examination:

The mail crane is the only obstruction I know of there that is in anything like close proximity to the track, and I have been going through there for the last year and a half. You can sit in the engineer's window and see that mail crane half a mile down the track, if you are looking for it and it is a clear day. No, you can't see anything unless you are looking for it, and this was a clear day. Mr. Linder's head must have been in the direction the mail crane was.
43 A man could sit and look through the front window or could lean out, and see that mail crane about a half mile away, and could see what it had on it just as far as the eye would reach. There was nothing to keep Mr. Linder from seeing the crane with the coach as he approached, for a half mile, if he was looking for it. Coming in the cab at the same time, he could be coming in and not have his eye on the crane. Yes, the way he got into the cab, when he threw himself in, the crane could be 2½ feet away and hit him. No, I don't mean to say he was struck while coming into the cab from the running board, it was after he got in the cab and stuck his head out the window. There is running laterally along the boiler on either side, what is known as a running board, and there is a large head window immediately in front of where the engineer sits, through which he can look straight down the track, without putting his head out the side window. He can go through that window and

walk out on the running board, that is the way they are supposed to, but there is others that climbs out. Mr. Linder had gone out through that window on the running board, and he evidently came back through it into the cab, and he took his seat, evidently where he belonged. Then he could either look out, straight down, without looking out the side at all, or he could put his head out the side and look down that way. No, I don't pretend to say he was struck when he was coming in off the running board, but I wouldn't swear that he had come in and taken his seat. The way I figure is, he could be standing inside the cab after coming in, and in order to clear his body he would have to lean out a little to sit on the seat box. Yes, he was sitting on the seat when I saw him, but he could have been knocked there. I didn't see him struck, but it was just before my hat got hit. I was looking down the train for a hot box, you can have from 1 to 5. The engineer knows where the hot pin is, but I didn't know whether the hot box was on my side or not. I was looking on my side, that I was in charge of, which is one third of the train. I am not necessarily supposed to ride the engine
44 on passenger trains. I ride it when there is no place else to ride.

Redirect examination:

At the time of the accident the train was going on an average of 35 miles an hour. If the engineer wanted to look at the driving pin through this window, he would have to lean out, 14 inches anyway, to see it.

J. T. GRANT, a witness for the Plaintiff, being duly sworn, testified as follows:

My name is J. T. Grant. I have had about 25 years' experience in railroad shops, as machinist and engine inspector. I have worked for the G. H. here about 15 years, as machinist, engine inspector, and, at times, foreman of the roundhouse. I was not foreman regularly, but sometimes for a month or so at a time. I am familiar with the manner and way locomotive engines are constructed and repaired. While working as machinist, I was called to repair most every part of locomotives. I know what the driving pin is, it is a pin and it depends on the stroke of the engine whether it is 24, on the main wheel of the engine which is 12 inches to the center of the axle. It is the main power of the engine, where it gets the power from the piston. That pin is caused to run hot sometimes, from lack of oil or lubrication and sometimes it pounds hot if it is not properly fitted. The pins never have to be repaired, the bearings do. They wear and the lips have to be filed off. If a pin is properly put in and properly set, it will not run hot. It will if the machinist makes it too tight, and the key can't be *reaised*.

—— NEELY, a witness for the Plaintiff, being duly sworn, testified as follows:

My name is Neeley, I am in the railway mail service. My run is from here to Tucson. I work on the train known as the "Californian." Nos. 1 and 2, which runs from Los Angeles to Chi-
45 cago, over the Southern Pacific, Southwestern and Rock Island. It runs over the Southern Pacific from Deming to El Paso. I have worked as a mail clerk about 12 years. With reference to picking up mail, there are a great many stations known as "catch stations," where we catch pouches hung for us. The crane, I believe is the stand where they hang the pouches, and we have a hook in the car door to catch them with. The crane is a post, or upright, by the side of the track, built and put there for that purpose. It has two arms sticking out like this (indicating) and the pouches are hung from there. We have a hook in the door, and when we pass, we raise the hook and the pouch is drug back in what we call a pocket in the rear of the hook, and we take the pouch in. The pouches are fastened in the middle with a leather strap, and are drawn to about that size in the center, (indicating). Our instructions are to catch the pouches just where the strap is. As to the hook in the car door—you all know about how wide the door is, well there is an iron rod that runs—I don't know what you call these little things—one iron rod is fastened across the door at either end, it is fastened so it will turn; it slides backward, we keep it back. There is a rubber to avoid hard jars. There is a handle on top, and when you pull this handle over, the hook is raised like this, (indicating) and the pouch strikes here and slides back. I haven't seen any cars but what the hook extended out about 29 inches from the side of the car. I think the sides of passenger coaches are flush with the side of the cab of the engine. You couldn't catch a mail pouch with this *jook* over 29 inches, anything within 29 you could. That is counting out the rocking of the train, it might rock 2 or 3 inches. If you could catch it attached at 29 inches, and the train rocked, it would pass inside and miss it. Outside of the rocking of the train, you could catch it at 29 inches. As to whether you could catch it with absolute safety at 25 inches, would depend on the rocking of the train.
If it rocked more than 4 inches, you couldn't. If the track
46 was in good condition and it didn't rock, you could catch it at 29 inches. Between here and Tucson it won't rock 3 inches, I don't think, I don't believe I ever caught them when it was rocking that much.

Cross-examination:

I run between El Paso and Tucson, out on No. 2 and back on No. 1, those are through trains from Los Angeles to Chicago. The "Californian," No. 2, going to Chicago, is made up in Los Angeles and leaves at 3 o'clock in the afternoon. I understand it comes over the Southern Pacific track into El Paso, then over the Southwestern to Santa Rosa, I believe, and it is taken over there by the

Rock Island and carried to Kansas City and Chicago. The same mail car that comes in here on No. 2 from Los Angeles doesn't go out on it, it is transferred, but it is the same class of car, interchangeable equipment. In emergencies, sometimes the Southern Pacific car goes through. Through the smaller towns and in places like in New Mexico and Arizona, that these various cars go by, the hook on the car is set, and it sweeps the pouch into our possession. That is seldom done by the clerk in charge, the helper does that. Yes, the man inside the car does that. Starting from Los Angeles on No. 2 and following the equipment to Chicago, over the Southern Pacific, El Paso and Southwestern and the Rock Island, this same car with the same hook, where the man in the car throws it out, takes mail from all cranes upon which mail is located. Naturally, there is a standard distance all the cranes are from the side of the car, they are all the same distance exactly, and are made so by post-office regulations. If they are not, somebody has made a mistake. In order to have uniformity, the post-office department fixes the distance of the cranes from the equipment and the length of the hooks, so the same hook which will take a sack off a crane in Arizona or New Mexico, will take it as it goes through western Kansas.

Redirect examination:

47 The post-office department doesn't require the railroad company to put up the cranes, they can either stop the train and pick up the mail, or put up the crane, it is optional with the railroad company which they will do.

Recross-examination:

But I understand, that if they do erect them and use the hook, they do it according to government regulations.

Redirect examination:

They are not compelled to put them up by the government, they do it of their own volition, in order to avoid stopping the trains.

Mrs. W. A. LINDER, a witness for the plaintiff, being duly sworn, testified as follows:

My name is Mrs. W. A. Linder, I am the wife of William Linder. We were married in 1901. At the time he met with the accident, we lived in El Paso. His run was from El Paso to Lordsburg, on the Southern Pacific. His average monthly wages for the year prior to his death was about $200. He was 42 years old at the time he died, he would have been 43 in August. I have three children, their names are William, Eugene and Orville, at this time they are 13, 8 and 6 years old. My husband's treatment of myself and the children was the best that could be. I had no means of support other than his wages at the time of his death, except a small piece of property we got $20 from. The best I can remember, I believe it

was 9 o'clock in the evening he was hurt, when I first saw my husband after the accident. I was with him to the time of his death, which was on the evening of the 11th of July, at about 6:30. I am sure he was conscious every day to the last, I think he was conscious when death struck him. I was with him every day, all day, and the biggest part of the night while he lived. The reason I believe that he was conscious, was that when I would speak he would reach for my hand, and wouldn't be satisfied with one, but
48 would take both. When I would talk to him, he would quiet down. On Thursday after he was hurt, I went in in the morning early, and I said "Papa, can't you speak to me," and he just "urred," that is the most sound he ever made to speak to me. I think he knew me, by the look he would give me that he recognized me, and 2 or 3 times he snapped his fingers when I started to leave, or friends would that were in the room. He seemed to recognize me. One day I was leaning on the bed and the nurse says "Do you know who this is, Mr. Linder," and he nodded his head. She referred to me, he was staring at me. He had a severe injury on his head. He was well before the accident, and his health was very good. His salary all went to the support of the family, myself and the children, and, of course, himself. I am 47 years old.

Plaintiff rests.

T. W. HALEY, a witness for Defendant, being duly sworn, testified as follows:

My name is T. W. Haley, I live at Tucson, Arizona. I am assistant trainmaster. As such, I have access to the records, time slips and reports made by the various engineers running on the Tucson division east. I knew Mr. Linder in his lifetime, perhaps, for 15 years. I first knew him in Tucson, for perhaps 8 or 9 years, and he afterwards moved to El Paso. While he was in Tucson, his run was both east and west, to Yuma and Lordsburg. After he began to work on the El Paso end, his run was from El Paso to Lordsburg, that, with the exception of from here to the river, is on the Tucson division, and the records are kept in Tucson.

Here counsel for Defendant introduced and read in evidence the records of the company, or time slips, showing the claim for time and number of trips made by W. A. Linder during the years 1914 and 1916.

49 This is a claim for time made by the engineer July 1, 1914, freight, Lordsburg to El Paso, engine 2810, etc. relieved at 12:40 at El Paso. Each and every one is signed by Mr. Linder. These are the various trips for that month, and show that in july, 1914, Mr. Lender made 22 trips over that division. Some were between here and Deming, but that covers the place where the accident happened. In August, 1914, he made 20 trips over the track in question, in September 19 trips, in October 22 trips and in December 16 trips, making a total of 99 trips from July 1, 1914, to December 31, 1914. I haven't the records for 1915, he

was on leave of absence in 1915, I don't know whether he was away the entire year or not. These records I now have in my hand are between Bowie and Deming, which doesn't cover the place of the accident. The records for 1916 show that from January 1st to July 1st, of that year — during the six months immediately preceding his accident on July 3, 1916—Mr. Linder made 154 trips past the point of the accident.

Cross-examination:

Part of those trips were on freight trains, but part were on passenger too. I would have to look through the records to see how many were on each. It is designated at the top whether it is a passenger or freight. The engine number wouldn't show. The train number would show whether it was a passenger schedule. He might be running extra and on passenger time. I can tell whether it is a passenger or freight from the time consumed, and from the train number — if they are running on No. 2 equipment, it would be passenger. When there is no mail sack on those cranes, the arms are what we call in a perpendicular position, one is up and one is down, and when the mail sack is hung up, they are like this (illustrating). I wouldn't say whether that is so with the one at Carney, I presume it is, but I haven't examined that one. With the crane at Carney, no, I wouldn't say that the arms would extend out with no mail sack on it. I presume
50 the arms are about 2½ feet long. I have had very little experience outside, in running trains, my work is inside work, in fact, the title I carry has nothing to do with trains, I am in charge of stations. Freight trains do not pick up mail, and all passenger trains do not, different trains pick up mail at different places. No, all passenger trains by Carney don't pick up mail, so it is possible Mr. Linder might have operated a passenger train through there that didn't pick up mail.

Redirect examination:

No. 2 should pick up mail at Carney, and if No. 2 was picking up mail there and he ran No. 2 through, he would pick it up.

(Witness retires to examine records and ascertain the number of trips made by W. A. Linder on passenger trains past the point of the accident.)

JOHN D. MATTHEWS, a witness for Defendant, being duly sworn, testified as follows:

My name is John D. Matthews, I live at Tucson, and have lived there about 9 years, I work for the Southern Pacific Company, and have been in their employ 18 years. I am division engineer and the territory I cover is between the Rio Grande and Colorado rivers, or between El Paso, Texas and Yuma, Arizona. I have the supervision and maintenance of the track and the structures along the

side of the track between the points mentioned. I worked for the Santa Fe at San Bernardino, California, about four years before working for the Southern Pacific, but have worked for no other railroads. The plans and specifications for these cranes are furnished to the division office by the San Francisco office. This particular crane at Carney was manufactured by the Columbia Mail Crane Company of Ohio. I don't know, of my own knowledge, whether the postal authorities have anything to do with
51 furnishing these plans and specifications. I have investigated the postal regulations governing the installation of these cranes, and have them here with me, Section 1355 provides that "At all points at which trains do not stop where the Postoffice Department deems the exchange of mails necessary a device for the receipt and delivery of mails satisfactory to the department must be erected and maintained; and pending the erection of such device the speed of trains must be slackened so as to permit the exchange to be made with safety. "There was a crane erected and maintained at Carney, in conformity with this section of the postal regulations. As to the distance of the cranes from the track, I have reasons for knowing that this particular one, and the general line of them, are within the requirements of the government, because the government has made objections to the setting of cranes on this division, and we have had to re set them to meet the requirements. The railroad furnishes the equipment for the mail car, subject to the specifications of the postal department. The cranes and entire equipment are subject to meeting the specifications of the postal department and the entire equipment is made in conformity therewith.

L. A. THOMPSON, a witness for Defendant, being duly sworn, testified as follows:

My name is L. A. Thompson, I live near Carney, New Mexico about 1½ away. I am a salesman for Krakauer, Zork & Moye, and was in July 1916. At that time I was also assistant postmaster. I got by appointment from Mr. Folks the postmaster at Deming. I was not at that time and have never been in the employ of the Southern Pacific. My duties as assistant postmaster were to receive mail and deliver it to patrons, and to hang the mail for the train, No. 1 was the one that I hung it for. No. 1 was scheduled to pass through Carney at 9:15 *or* 9:16 in the morning. Carney is about 11 miles east of Deming, that is this side of
52 Deming. I recall the day that the accident befell Mr. Linder from which he died, but I didn't see it. I hung the mail on that particular day. I hung it probably from 5 to 15 or 20 minutes before No. 1's time. I don't recall exactly the time. There is no agent at Carney, and no telegraph station, and no operator or dispatcher. At that time we had no way of telling whether the train was on time or not, we have a phone in our house but it was out of order. The government furnishes us with no means here of letting us know with reference to the trains. I hung the mail

out in time for No. 1, and I did not know on that particular morning that there was a passenger train running ahead of No. 1.

Cross-examination:

Yes, sir, we had a phone. The railroad company did not notify me that there was an extra ahead of No. 1. I have been told since that the postal laws do not permit the mail to be hung for more than ten minutes prior to the arrival of the train, whether it is on time or late. I presume that is true, but I don't know that it is. I have been told since that that was the case.

Redirect examination:

I had no instructions with reference to that. I presume the purpose of the rule that the mail couldn't be hung out earlier than ten minutes before the train arrived, was to keep it from being stolen. I don't know that that is the reason. No, I know nothing about that order. I suppose I took my orders from the government. Yes, I do know, the only orders I could take were from the government. I was not employed by the railroad company or under its direction.

G. A. THUMB, a witness for Defendant, being duly sworn, testified as follows:

53 My name is G. A. Thumb, yes, Gustavus Adolphus. I am a locomotive engineer for the Southern Pacific, and have been on the Tucson division since 1888. I am running passenger trains, and I have run on No. 1 and No. 2, they are trains coming and going to Chicago, No. 1 goes west and No. 2 east. I think the time of No. 1 at Carney, New Mexico, in July 1916 was about 9:05 or 9:08, some place along there,—a little after 9. I am not positive. Carney is 11 miles east of Deming. When I operated No. 1 it picked up mail at Carney. I am familiar with the mail crane at Carney, and there are others like it at Anapra, about 7 miles west, at Lanark, 28 miles west of here, at Aden, 44 miles, at Cambria, 62 miles, at Mindus, about 74 miles and at Mesa, that is about 3 miles further west than Mindus, then the one at Carney about 3 miles west of Mesa. That is all between here and Deming. Going west, they are all on the righthand side of the track, that is the north side according to the points of the compass. Those cranes are approximately the same distance from the track, as near as I can tell as engineer. I was familiar with the cranes along there in July 1916, and I didn't notice any difference in the crane at Carney from the others or that it was too close. I went by that night, after 12 o'clock the day he was struck. I saw the crane, and I didn't consider it in close proximity to the track. I had read in the paper that he had been struck, and took particular notice to see if it was close. As to the windows in an engine, in this corner (indicating) there is a window looking straight ahead, it is big enough for me to squeeze through, you can go out on the running board through it. The

side of the cab comes along here, and there are two windows, some slide so you can close them in case of bad weather conditions, we call them storm windows. There is an arm rest to lean on, and you can look out this window. It is optional with the engineer whether he leans out of the cab and looks through this window, or sits without leaning out and looks through the window ahead. Most of the engineers when they are leaning on the cab, lean on their ribs and they get sore, and they don't want to lean out more than pos-
54 sible. I could see that mail crane at Carney a half mile down the track. East of Carney for approximately 20 miles the track is straight, it is kind of rolling,—right at Carney it is considered to be a flat. West of Carney about 500 yards, or a little more, a curve commences and the track curves to the left. Going west, I could see the mail crane for a half mile east of Carney. I wouldn't be apt to see a sack on it, but the crane I could, it is painted white.

Cross-examination:

Whether you can see the driving pin from the end window, depends on the class of engine you are running. If there is no running board, you can, and on some the running board is high so you can look down and see it. I don't know what engine Mr. Linder was operating. No, you couldn't see the driving pin of it had a running board and it extended back to the cab. Yes, it is one of the duties of the engineer to watch the driving pin if it runs hot, that is what he is on for. He is not supposed to look out of the window on the right side of the cab in order to do that, you can smell it, you can't see it, you must remember when the driving wheel is going round, that it is hard to see. You don't have to look, you can smell it. If the driving pin was running hot, I wouldn't look at it. I would stop and see what was the matter. If it is smoking you know it is hot, but you don't know how hot, it may be red hot, and if there was smoke, I would stop and see what was the trouble. It don't make any difference if you are approaching a station, you are supposed to stop and see, and you have a perfect right to stop on the main line or anywhere. Even a mile from the station I would stop, and if there is no reason to stop at the station you might as well stop a mile or two farther away. You could put grease in the driving pin, or a drop of oil, that is all it needed. Yes, the track at Carney is good track to ride over. You can see the crane a half mile away, it is white, but the sack is generally dirty from being on the ground and you can't see it that dis-
55 tance, but within five or six hundred feet you can see the sack. No, they don't usually hang the mail for freight trains, unless it — a freight that is supposed to carry mail. Once in a while a mixed train carries mail, I don't know as they do here, Mr. Linder was a freight engineer. This train doesn't carry mail.

Redirect examination:

Mr. Linder took his chances running extra on passenger trains, the same as the others. If he happened to be first out, and a regular man laid off, they sent him on a passenger train.

Here counsel for Defendant introduced and read in evidence the following section from a pamphlet entitled "Information issued by the Second Assistant Post-master General Relative to the Transportation of Mails by Railroads:"

Sec. 1177. All cars or parts of cars used for the Railway mail service shall be of such style, length, and character, and furnished in such manner, as shall be required by the Postmaster-General, and shall be constructed, fitted up, maintained, heated, and lighted by and at the expense of the railroad companies.

WILFRED TAYLOR, a witness for Defendant, being duly sworn, testified as follows:

My name is Wilfred Taylor. I am a locomotive fireman. I was firing for the Southern Pacific in July 1916, and am still in the employ of the company. I was running with Mr. Linder on the occasion of the unfortunate accident which befell him. We were running what is termed on the list a doghouse special, a soldier train, in other words. It is a funny name, I don't know the idea, probably on account of the caboose attached, that seems to be what they call a caboose. The doghouse special reached Carney that morning close around 9:15 A. M. I was on my side of the
56 engine, the lefthand side. When we got along towards Carney, Mr. Linder asked me to go on the outside, on the left, give me the sign to go out, to see if anything was running hot. I went out and back, and shook my head that I didn't see anything wrong. He went out on his side, I saw him go out and in. As he came in, he had one hand on the reverse lever, at this time I went to put on my injector. That is part of my duty. The injector carries water into the boiler. I went to put the injector on, and what you call the monitor, they use the monitor and triplex,—I was putting it on, and I looked to see if it was picking up the water clean. Mr. Linder was in his seat. Then the brakeman called that Linder was hurt or killed. I couldn't hear distinctly what he said, I don't know the exact words, there is always noise and two-thirds of the things done on an engine are through signs. I noticed something was wrong because the brakeman shut off the engine, the throttle. The minute he did that, I knew something was wrong, and I jumped up and put on the emergency air and brought it to a stop. At that time Mr. Linder was sitting in his seat. I didn't see what he was doing at the time he was struck. Then we got him medical aid, and that is all. That was about 9:15.

Cross-examination:

When I saw him, he was sitting there unconscious.

T. W. HALEY, recalled.

I have examined the records, and find that Mr. Linder, during the past two years, made 12 trips on passenger trains, three of which were on No. 102, which picks up mail at Carney, the last was on May 27, 1916. The other trips were on freight trains.

J. A. O'BRIEN, a witness for Defendant, being duly sworn, testified as follows:

57 My name is J. A. O'Brien, I am a conductor for the Southern Pacific. I was such in July, 1916, and am still in the employ of the company. I was conductor in charge of the train Mr. Linder was on, on July 3*m* 1916. The accident happened at Carney, New Mexico. We reached there at 9:15 A. M. I was in the caboose. The train stopped at Carney, it stopped rather suddenly. No, it didn't go in emergency, it just stopped the usual way. The head brakeman, Anderson, came running back and says "Engineer Linder is hurt." Of course, I hurried to see what the matter was, and I found the engineer laying upon the seat box with his head under laying back and the blood trickling down. I got off the engine and said—That is all I saw, I was in the caboose at the time.

Cross-examination:

I was riding in the caboose. No, sir, I didn't look at the end of the mail crane that hit him.

—— BUTLER, a witness for defendant, being duly sworn, testified as follows:

My name is Butler. I live at Deming, and have lived there since 1909. I am roadmaster for the Southern Pacific. I remember the occasion when an accident happened to an engineer in July, 1916, when he was struck by a mail crane. That happened on my division. About an hour and a half or two hours after it happened I was on the ground. I went down and took a clerk and a section foreman on that section to measure the ground to see whether it was level or anything out of the way, and to measure the distance of the crane from the track, and see if anything was down there that caused this. I have been in the track service since 1887, and I think I am familiar with the condition of railway track, and when I examine it know whether or not it is — good serviceable condition.

58 I examined the track at the point of the accident, and it was in average good shape. I afterwards stopped a local engine of the same size and character as the one Mr. Linder was in to take measurements, the idea was to see how close the end of the arm would come to the cab, when the arm was elevated and had mail on it. Say the upper portion of this woodwork is the cab window (illustrating) and extending out beyond is an arm rest, from

the edge of the arm rest to the end of the crane when it is elevated it is about 14 inches, now this arm rest is from 4 to 6 inches, which would make about 18 inches, from the cab window to the end of the crane, I saw nothing wrong about the track or equipment, after my inspection. I didn't make any repairs on it, it is still to-day like it was then.

Cross-examination:

The track was in good condition and that is a level country, so the engine wouldn't unnecessarily weave. That track was in first class condition, I put the level on it to see if there was anything wrong. I know what the distance of the cranes were from the side, or what they ought to be, but that is not my business, putting up cranes, we have a regular man to do that. A section foreman doesn't live there, he was 4 or 5 miles from there.

It is agreed between counsel for Plaintiff and Defendant that W. A. Linder, at the time of the accident, was operating an engine engaged in Interstate Commerce.

We, the parties to the above numbered and entitled cause, hereby agree that the above and foregoing statement of facts, made up in duplicate, is a true and correct statement of all the facts admitted and of all the evidence introduced on the trial of said cause.

Witness our hands in duplicate, on this the 29 day of Jan., A. D. 1918.

GEO. E. WALLACE,
W. S. BERKSHIRE,
Attorneys for Plaintiff.

59 BEALL, KEMP & NAGLE,
Attorneys for Defendant.

The above and foregoing statement of facts, made up in duplicate having been submitted to me, and having been examined by me and found correct, and it appearing that the same has been agreed to in duplicate in writing by the parties to said cause, the same is hereby approved as the correct statement of facts in the above styled cause in duplicate, and it is ordered that the same be filed as a part of the record in said cause this the 29 day of January, A. D. 1918.

P. R. PRICE,
Judge 41st Judicial District of Texas.

Order of the Court of Civil Appeals, Recorded in Volume Two, at Page 375, Setting said Cause for Submission.

Wednesday, November 6th, A. D. 1918.

On this day it is the order of the Court that the following styled and numbered cases be, and they are hereby, set down for submission for Thursday, November 21st, A. D. 1918, to-wit:

No. 891—Southern Pacific Co. vs. W. S. Berkshire, Admr., from El Paso.
(Other cases.)

Notation on the Docket of the Clerk of the Court of Civil Appeals Showing Filing of Briefs.

Apr. 5, 1918, filing briefs 4 appellant.
May 4, 1918, filing briefs 4 appellee.

Entry in the Minutes of the Court of Civil Appeals, Volume Two, at Page 386, Showing Cause Taken under Submission.

November 21st, 1918.—Submitted on briefs.

Judgment of the Court of Civil Appeals, Recorded and Entered in Minute Book, Volume Two, at Page 391.

60 No. 891.

SOUTHERN PACIFIC COMPANY, Appellant,

vs.

W. S. BERKSHIRE, Admr., Appellee.

Appeal from the District Court of El Paso County, Texas.

Thursday, December 5th, 1918.

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the Court below be in all things affirmed; that the appellee, W. S. Berkshire, Temporary Administrator of the Estate of William A. Linder, do have and recover of and from the appellant, Southern Pacific Company, and its sureties, C. R. Morehead and Geo. D. Flory, the amount adjudged by the Court below and all costs in this behalf incurred, and this decision be certified below for observance.

61 No. 991.

SOUTHERN PACIFIC COMPANY, Appellant,

vs.

W. S. BERKSHIRE, Temporary Administrator and Personal Representative of the Estate of William A. Linder, Deceased, Appellee.

Appeal from District Court of El Paso County.

Opinion.

W. S. Berkshire, appellee, plaintiff in the court below, brought this suit as temporary administrator and personal representative of the Estate of William A. Linder, deceased, against appellant, for the use and benefit of the surviving wife and children of the said William A. Linder, deceased. William A. Linder was employed by appellant as locomotive engineer, running between El Paso, Texas, and Lordsburg, New Mexico, and while running and operating an engine attached to one of appellant's trains, between said points, at Carnes, New Mexico, deceased was struck by a mail crane and was thereby injured so as to cause his death shortly thereafter.

Appellee alleged negligence on the part of appellant in placing and maintaining the mail crane or such portion of same in such close proximity to the railroad track and engine as not to be reasonably safe for the engineer in his position on the engine, in the ordinary performance of his duties, and in such close proximity to the railroad track and engine as to strike deceased while occupying his usual and customary position on the engine, and thereby causing injuries from which he died.

Appellant answered by general demurrer, general denial, by plea that deceased, Linder, met his death while in the employment of appellant and while engaged in interstate commerce, and that Linder's death was due to risks and dangers assumed by him, for which appellant was not liable.

62 A trial before a jury resulted in a verdict in favor of appellee in the sum of $15,000.00, apportioned to the surviving wife and children.

Appellant presents six assignments of error as grounds for reversal. The first three assignments are based on the refusal of the court to give appellant's special charge to return a verdict in favor of appellant.

The record shows that at the time of the accident resulting in the death of Linder, he was engaged in operating an engine and train then engaged in interstate commerce. Such being the fact, the Federal Employers' Liability Act applies; the doctrine of assumed risk as construed and applied under that Act controls, and it is the contention of appellant under its several propositions, both of fact and of law, that Linder, while operating his engine at the time he was injured, assumed all the risks and dangers incident to his employment

engineer on said train, and the injury which he received resulting in his death, was the result of such risks, and the court should have given the peremptory charge requested. It is appellant's contention under its fourth assignment that the court was in error in submitting to the jury any issue of negligence because, as claimed, there was no evidence of negligence on the part of appellant proximately causing the injury to Linder. The fifth and sixth assignments claim error in submitting any issue of assumed risk because, as claimed, Linder assumed all the risks ordinarily incident to operating the engine under the facts and circumstances shown to exist at that time; that there being no negligence on the part of appellant shown, the risks assumed did not grow out of negligence on the part of appellant.

It is appellee's contention that the court was not in error in refusing to give the requested peremptory charge in favor of appellant, for the reason that the evidence called for the submission of the issues, and that it was the province of the jury to determine them. There is but little, if any, controversy in the evidence.

The facts pleaded, and the uncontradicted evidence show the following:

At the time William A. Linder was injured, appellant was engaged in the business of interstate carrier by railroad for hire over its line of railroad extending from El Paso, Texas, westward through the States of New Mexico, Arizona and into the State of California; over its lines of railroad it operated both passenger and freight trains; the place or station, Carney, at which the injury to Linder occurred, is a station (called in the evidence a blind siding) in New Mexico, between El Paso, Texas, and Deming, New Mexico; at the time Linder received his injuries, he was an employee of appellant as locomotive engineer and was operating an engine pulling a passenger train carrying soldiers on appellant's road and was going west from El Paso, Texas, to Deming, New Mexico; the appellant did not maintain an office or agent at Carney; at Carney the United States mail was taken by appellant's mail trains from mail cranes placed near the side of the railroad track; at a point before reaching Carney it was noticed that "the main driving pin on the engine was running hot"; there was light dim smoke on the engineer's side from the driving pin; it run hotter and hotter to about a mile from Carney when Linder stepped out of the cab through the front window on the running board, got on his hands and knees to see whether the pin was getting hotter; afterwards Linder returned to his seat in the engine cab; just then the mail sack from the mail crane at Carney fell and it was immediately discovered that Linder was sitting on the engineer's seat in the engine cab in an unconscious condition, his right arm, head and part of his body outside of the cab, leaning with the right side and arm over the arm rest of the storm or side window of the engine; the head train brakeman was at the near end of the engine cab looking back and down the train with his left side from ten to eighteen inches out beyond the side of the engine tank and cab and while in that position, either the mail crane or the mail sack (witness did not know which) knocked his hat from the

64 left to the right side, and he was hit on the side of the face with blood from Linder; Linder had a cut on the right side above and about one inch over the right ear; while no one saw the mail crane strike Linder, the evidence justifies the finding that Linder received the injury causing his death by being struck on the head by the arm of the mail crane; Linder was injured at 9:15 o'clock on the morning the 3rd day of July, 1916; the day was clear, and on a clear day a man could sit on the engineer's cab seat and look through the front window of the cab or could lean out of the storm or side window of the cab and see the mail crane a half mile away and could see the crane and mail pouch 500 yards away; at the time Linder was injured the train was going on an average of 35 miles an hour; if Linder wanted to look at the driving pin through the side window he would have to lean out fully fourteen and possibly as much as nineteen inches beyond the side of the cab, to see it; at the time Linder was injured, he had been running on both passenger and freight trains between El Paso and Deming over a period of several years, had made many trips over that portion of appellant's road and by the station Carney, making 156 trips past Carney during the six months next preceding the time of the accident, during all of which time said mail crane was there, and was similarly located as on the day of the accident, and some of the passenger trains on which Linder was engineer took up the mail in passing from the mail crane at Carney; there were several other mail cranes at other stations on appellant's line between El Paso and Deming and having approximately the same relative position with reference to the cab and the track as the one at Carney; there is a standard distance all of the cranes are placed from the side of the car and are made so by post office regulations; the post office department does not require the railroad companies carrying the mail to put up the cranes; they can either stop the train and pick up the mail or put up the crane and take the mail therefrom; where the cranes are used the company is required to erect them and according to post office department regulations; while there was no
65 direct evidence to the effect that Linder knew of the mail crane at Carney, without stating the evidence, it justifies the finding that Linder knew that a mail crane was maintained and used at Carney and knew its general location with reference to the side of the engine cab, but had nothing to do with its maintenance, location or use; the train on which Linder was riding at the time of his injury was not the mail train; the mail train was to follow shortly thereafter and the mail pouch was hung on the arm of the mail crane by the postmaster at Carney for the mail train following and from 15 to 20 minutes before the mail train's time at Carney; in placing the mail pouch on the crane, the postmaster acts under the orders of the post office department.

There is no complaint as to the verbiage of the Court's charge in submitting the issues of negligence and assumed risk. The contention is that there is no evidence of any negligence on the part of appellant in placing or maintaining the mail crane in its position at Carney, and that if there was negligence in placing and maintain-

ing the crane in its position, the undisputed evidence shows that the position of the crane with reference to the engine was obvious and known to Linder, or which he must necessarily have known in the discharge of his duties as engineer; that the injury to Linder grew out of and was the result of risks ordinarily incident to his employment; that under the undisputed evidence of his knowledge of the presence and position of the crane, Linder, while operating the engine in interstate commerce, assumed all risks and dangers incident to the negligence of appellant; that where the proof was vague, indefinite and uncertain as to the distance between the mail crane and the side of the engine, the evidence was insufficient to submit to the jury any issue of negligence or assumed risk, and the court should have instructed the verdict for appellant.

The court instructed the jury on the issue of negligence that if they found "the position of the mail crane was so near to the
66 track as not to be reasonably safe for an engineer in his cab in the ordinary performance of his duty, and the defendant was guilty of negligence in so constructing and maintaining said crane in such close proximity to the track, if said crane was in such proximity to the track as not to be reasonably safe, and that such negligence if any was the proximate cause of the death of William A. Linder, then your verdict will be for the plaintiff" unless they should find for defendant on other issues.

On the issue of assumed risk, the court charged that if the jury found "the proximate cause of the death of the said William A. Linder was from the ordinary risks and dangers incident to his employment, or that prior to the happening of the accident, deceased, William A. Linder knew of the position of the crane which is alleged was so constructed and the location thereof, or that in the ordinary discharge of his duties must necessarily have known of same, and that he appreciated the danger thereof, then and in such event you so find, you are instructed that he assumed the risks and your verdict will be for the defendant."

Appellant refers us to many cases, both State and Federal in support of its propositions.

Negligence is essential to liability for unintentional injury. While the issue of negligence is a fact to be determined by the jury, to justify its submission, the evidence must show under the charge given, that the position of the mail crane was placed so near the railroad track as not to be reasonably safe for Linder in his cab while in the ordinary performance of his duties as engineer. The evidence does not give us a standard of distance from the side of the cab at which the crane could be placed, and be reasonably safe for the engineer. It does not give us a proximate standard of distance from the side of the engine within which an engineer would ordinarily perform his duties in operating his engine, and otherwise keep a lookout for a proper handling and movement of the engine. While, no doubt, the only available evidence as to what Linder was doing and just how far he was reaching out from the side of
67 the cab at the time he was struck by the crane was offered on the trial, to establish the fact that at the time Linder came in

contact with the crane, he was then in the ordinary performance of some one of his duties and that in its performance he did not reach out beyond what would ordinarily be considered a reasonably safe distance, at which the mail crane could be put, is more or less a matter of surmise. The question presented is: Was the evidence offered and the attendant facts and circumstances shown, and to which we may look, sufficient to take the case to the jury? The evidence shows beyond question, we think, that at the time Linder was injured he had just reentered his cab from a trip of inspection of his engine and had discovered that the main driving pin on the engine was running hot and was getting hotter and hotter. The condition of the driving pin was noticeable. It began about a mile out from Carney, but it was not then known whether it was on the engineer's side of the engine, or on the fireman's side. A light, dim smoke from the hot driving pin was discovered on the engineer's side. At the moment Linder returned to his seat on the cab, the front brakeman was standing in the gangway between the engine and the tank, with his hands on both grab irons looking out down the side of the train, trying to discover a "hot box." He testified:

"Just then this mail sack fell. At the time it fell, either the crane or the sack knocked my hat from the left to the right side and I got this drop of blood on my face. * * * I should judge that at that time my head was out about fourteen inches from the side of the engine, tank and cab. * * * My head was out from ten to fourteen inches, I can't judge exactly myself, it would have to extend that far in order to see down the side of the train. My whole body was in the cab. At the time my hat was struck, I felt the blood and noticed the sack going down at the same time, and the blood hit me on the side of my face. When I turned round to Mr. Linder, he had a cut on the right side, above the ear, about an inch over the right ear, to my knowledge. I shut the throttle off and started applying the brakes. The fireman was on the side where he belonged, setting the injector. The first thing that attracted my attention to the accident was noticing the sack, after it struck my hat. After the sack fell, I reached up and felt the blood. There was some on my glove, also. That wasn't blood I lost, it didn't scratch me,—just struck my hat. I don't see how I could have extended out over fourteen inches. * * * I suppose I could have swung out a foot and a half. I was looking back. I know it struck him. No, I didn't see it strike him and I wasn't looking in that direction at the time. * * * I hadn't been looking in Mr. Linder's direction for two minutes, or about that length of time. * * * This crane stands on the same basis as any other,—it is like all the balance of them. I never measured the distance it was from the track, but I should judge fourteen inches from the parallel
68 part of the cab,—four inches from the arm rest and nine or ten inches to the point of the crane—may be more or less, but fourteen inches from the parallel part of the cab to the crane. The cab window and the coach line behind are supposed to be parallel.

Linder had to have his head partly out of the cab window to be struck. In order to get in position, to get in his seat, I would judge he would have to be in that position. It don't take much to get fourteen inches out, but certainly, for anything to hit it, it would have to be out fourteen inches. * * * That is just an estimate—it may be 15, 18 or 19,—I don't know. * * * At the time of the accident the train was going on an average of thirty five miles an hour. If the engineer wanted to look at the driving pin through this window, he would have to lean out fourteen inches, anyway, to see it."

Section 1355 of the Postal Regulations, introduced in evidence, provides:

"At all points at which trains do not stop where the post-office department deems the exchange of mails necessary, a device for the receipt and delivery of mails satisfactory to the department must be created and maintained."

Witness Matthews testified in part:

"There was a crane erected and maintained at Carney in conformity with this section of the postal regulations. As to the distance of the cranes from the track, I have reasons for knowing that this particular one, and the general line of them, are within the requirements of the government, because the government has made objections to the setting of cranes on this division, and we have had to reset them to meet the requirements. The railroad furnishes the equipment for the mail cars, subject to the specifications of the postal department. The cranes and the entire equipment are subject to meeting the specifications of the postal department, and the entire equipment is made in conformity therewith."

Witness Neeley testified in part:

"I am in the railway mail service. My run is from here to Tucson. There are a great many stations known as 'catch stations' where we catch pouches hung for us. The crane, I believe, is the stand where they hang the pouches and we have a hook in the car door to catch them with. The crane is a post, or upright, by the side of the track, built and put there for that purpose."

After describing the way the device works, in taking the mail pouch from the crane, the witness said:

"I haven't seen any cars but what the hook extended out about 29 inches from the side of the car; * * * you couldn't catch a mail pouch with this hook over twenty-nine inches; anything within 29 you could; * * * outside of the rocking of the train you could catch it at 29 inches. As to whether you could catch it with absolute safety at 25 inches would depend on the rocking of the train. If it rocked more than four inches you couldn't. * * * Naturally there is a standard distance all the cranes are from the side of the car,—they are all the same distance exactly and are made so by post office regulations—the same hook which will take a sack off a crane in Arizona and New Mexico will take it as it goes through western Kansas. The post office doesn't require the railroad to put up the cranes—they can either stop the train and pick up the mail, or put up the crane—it is optional with the railroad which they do.

But I understand that if they do erect them and use the hook,
69 they do it according to government regulations."

We think it sufficiently appears from the facts shown that Linder's injury was caused by his coming in contact with the arm of the mail crane, and that at the time of his injury he was then at his place on the cab of his engine, looking out of the side or storm window and in the direction of the driving pin on the engine, his head extending at least fourteen inches beyond the side of the cab. The jury could well conclude from the evidence that the arm of the mail crane or the mail pouch that struck the brakeman's hat, struck Linder. The jury could also conclude from the evidence that the point of the arm of the mail crane extended to within 14 inches of the side of the cab. The mail pouch could be reached and taken by the hook, the other portion of the device, at any distance between 25 and 29 inches. The erection of the crane was shown to be for the convenience of the appellant. While the evidence is meager, we think the jury could well conclude from it that all that was essential to a proper use of the mail device was that the mail pouch when placed on the arm of the crane should be at such distance from the passing train that the end of the hook or catcher bar would extend beyond it, and, from the evidence of the witness Neeley, the railway mail agent on that division of the road, it is established that the device could be so placed and used and the mail pouch taken at a distance of 29 inches from the side of the train. The evidence shows that the side of the engine is flush with the side of the coaches. True, the witness Matthews testified that the crane at Carney was erected and maintained in conformity with the postal regulations. But this statement is more a conclusion than the statement of a fact. The postal regulation introduced does not state the distance the crane must be from the track or coaches, nor does the evidence of any of the witnesses show the distance the postal regulations require the arm of the crane to be from the track or coaches, nor is there any evidence in the record, other than that of the brakeman, Anderson, as to the distance of the arm of the crane
70 from the side of the cab. But if it should be held that the evidence was sufficient to show that the crane was placed at whatever distance the postal regulations require, still that fact alone would not have the effect to exclude other evidence on the issue of negligence and establish the fact that the crane was placed at a reasonably safe distance from the engine, but the question of negligence, it being a question of negligence vel non, would still be open for the jury to determine from all of the evidence. We have reached the conclusion that the evidence was sufficient on the issue of negligence to take the case to the jury. Judge Williams in speaking for the Supreme Court in M. K. & T. Ry. Co. vs. Williams, 103 Tex. 228, in a somewhat similar case, on one of the issues of negligence in that case, said:

"The occurrence itself is sufficiently indicative of negligence on defendant's part to call for an explanation from it freeing it from such an imputation. The killing of one of its employees while in the proper performance of his duty, by contact with a structure of its own contrivance near the track, strongly indicates a lack of proper care

and foresight in the location of the structure, in view of the reasonable presumption that it could have been consistent with the safety of employees while rendering the ordinary service."

The evidence does not show the actual distance the point of the arm of the crane was from the side of the cab, nor does it show approximately the distance an engineer would ordinarily reach out from the side of the cab in the ordinary performance of his duties. The jury could well have concluded from the evidence that Linder was out from the cab not exceeding about fourteen inches, when the hook or other part of the device could have taken the mail from the crane at as much as 29 inches.

The other question presented is: Did Linder assume the risk? At the time of the accident, Linder and the engine and train he was operating were engaged in interstate commerce. This being true, the Federal Employers' Liability Act applies, and that act leaves the application of assumed risk as it was at common law, as recognized and construed by the Federal courts. What seems to us to be a clear statement of the doctrine of assumed risk is made by the Supreme Court of the United States in the case of Gila Valley G. H. & N.
71 Ry. Co. vs. Hall, 232 U. S. 101, 34 Sup. Ct. 229, 58 L. Ed. 524. In that case, the court said:

"An employee assumes the risk of dangers normally incident to the occupation in which he voluntarily engages, so far as these are not attributable to the employer's negligence, but the employee has a right to assume that his employer has exercised proper care with respect to providing a safe place to work * * * and is not to be treated as assuming the risk arising from a defect that is attributable to the employer's negligence, until the employer becomes aware of such defect, or unless it is so plainly observable that he may be presumed to have known of it. Moreover, in order to charge an employee with the assumption of a risk attributable to a defect due to the employer's negligence, it must appear, not only that he knew (or is presumed to have known) of the defect, but that he knew that it endangered his safety; or else such danger must have been so observable that an ordinarily prudent person, under the circumstances, would have appreciated it."

To the same effect is Seaboard Air Line Railway Company vs. Horton, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1068.

It has often been stated, both by Federal and State courts that in order to charge an employee with assumption of risk attributable to the employer's negligence, it must appear that the employee not only knew of the defect or unsafe condition of the place where he was to perform his service, but that he knew it endangered his safety. In T. & P. Ry. Co. vs. Swearingen, 196 U. S. Sup. Ct., 49 L. Ed. p. 382, Swearingen said he knew that he had to pass the scale box at the time he was hurt, but that he was not then thinking about it and did not see it when he passed it going after the cars, that there was nothing to hide the scale box from his view, it was open and apparent. He said he knew the location of the scale box before he was hurt. Judge Mc[illegible]y in that case instructed the jury that the mere fact that Swearingen knew of the existence and location of the scale

box, would not as a matter of law charge him with knowledge of the danger, if such danger was there, due to the proximity of the north rail to track 2, and whether he knew of the danger was a question of fact for the jury to determine in connection with all the facts and circumstances in evidence. The proof was that the distance at which the scale box was put from track 2 was standard and considered a safe and proper distance in putting in scales where the tracks are standard gauge apart. That the tracks in the yards were standard gauge apart, and that the scales had been erected a number of years prior to the happening of the accident and after tracks 1 and
72 2 were built. We refer to the case for further statement of the facts. In passing upon the case, Mr. Justice White, for the Supreme Court said:

"The record shows that there was evidence tending to establish that the track scale box was not erected in a reasonably safe place, and that, although the plaintiff knew that the scale box was situated adjacent to Track No. 2, he did not know that it was so near that it could not be passed, in the performance of his duties as a switchman, without danger."

The court held in that case that, prima facie, the location of the scales where the tracks were only the standard distance apart, and under the facts stated, did not incontestably establish the performance by the company of the duty imposed upon it to use due care to provide a reasonably safe place for the use of the switchman in its employ, and that it was therefore properly a question for the jury to determine whether or not the scales were maintained in a reasonably safe place, and if not, whether Swearingen had notice thereof. It seems to us in this case, as held by both the court of appeals and the Supreme Court in the Swearingen case, that the dangerous contiguity of the arm of the mail crane and the extra hazard to Linder resulting therefrom was not so open and obvious on other than a close inspection, as to justify taking from the jury the determination of the question whether there had been an assumption of the risk. Linder was entitled to assume that the Company had use- due care to place the mail crane at a reasonably safe distance from the side of the engine for the performance by him of his duty in looking after the proper running of his engine. The fact that the company might not have performed such duty in respect to the erection and maintenance of the mail crane at Carney was not so patent as not to be readily observable, the trial court nor this court cannot declare as a matter of law, arising from the evidence, that Linder had assumed the hazard incident to the actual situation. The fact that Linder had often passed the mail crane in operating his engine over that part of the road, and that was the extent to which the evidence goes, might clearly establish the fact that he knew of the use of the crane in the train mail service and of its position with reference to
73 side of the engine, but it being a device separate and apart from his engine and something with which he had nothing to do in the operation of his engine except on a few occasions to slow up the train at that point to enable the mail clerk on the train, by use of

the device, to take the pouch from the arm of the crane, there is nothing in the evidence to show that his attention was ever called to the distance the arm of the crane, when elevated, would be from the engine, or that, when elevated, the crane could not be passed without danger to him, when in the discharge of any duty necessary to be performed in the proper care and handling of his engine. It might be remarked in this connection, as said by the court in Railway vs. Williams, supra, that the mere adoption of such a device for handling the mails would imply that its proper use would not endanger employees so engaged on passing trains, and that a collision would not likely happen when proper care is used to make it safe. We are of the opinion that the court was not in error in any of the matters pointed out in the assignments.

The case is affirmed.

A. M. WALTHALL,
Associate Justice.

Endorsed: Opinion, No. 891. 1 Court of Civil Appeals, Eighth Supreme Judicial District of Texas. [illegible] Southern Pacific Company, Appellant, vs. W. S. Berkshire, Temporary Administrator and Personal representative Estate of William A. Linder, deceased, Appellee. From El Paso County. By A. M. Walthall, Associate Justice. Affirmed. Court of Civil Appeals, El Paso, Texas. Filed Dec. 5, 1918. J. I. Driscoll, Clerk. Filed in Supreme Court Feb. 3, 1919. F. T. Connerly, Clerk. With App. No. 11076.

74 *Appellant's Motion for a Rehearing.*

Filed Dec. 18, 1918.

Court of Civil Appeals, El Paso, Texas. J. I. Driscoll, Clerk.

In the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas, at El Paso.

No. 891.

SOUTHERN PACIFIC COMPANY, Appellant,

vs.

W. S. BERKSHIRE, Temporary Administrator and Personal Representative of the Estate of William A. Linder, Deceased, Appellee.

Now comes the Southern Pacific Company, appellant in the above numbered and entitled cause, and moves the court to set aside and hold for naught the judgment and opinion rendered by this Honorable Court in the above numbered and entitled cause on the 5th day of December, 1918, and to grant it a rehearing herein and upon such rehearing that the judgment of the Trial Court heretofore en-

tered in this cause be reversed and remanded for the following reasons, to-wit:

First.

The Honorable Court of Civil Appeals erred in overruling appellant's First Assignment of Error and the propositions thereunder.

Second.

The Honorable Court of Civil Appeals erred in overruling Appellant's First Proposition under its First Assignment of Error.

Third.

The Honorable Court of Civil Appeals erred in overruling appellant's First Additional Proposition under its First Assignment of error.

75 Fourth.

The Honorable Court of Civil Appeals erred in overruling appellant's Second Additional Proposition under its First Assignment of Error.

Statement.

Under its First, Second, Third and Fourth Propositions as above set out.

We respectfully refer this Honorable Court to Appellant's brief, pages, 4, 5 and 6, for its First Assignment of Error and propositions thereunder above referred to and statement thereunder.

Fifth.

The Honorable Court of Civil Appeals erred in overruling appellant's Second Assignment of Error as the same appears on pages 7 and 8 of appellant's brief.

Sixth.

The Honorable Court of Civil Appeals erred in overruling and not sustaining the additional proposition under appellant's Second Assignment of Error.

Seventh.

The Honorable Court of Civil Appeals erred in overruling and not sustaining Appellant's Second Additional proposition under its Second Assignment of error.

Statement.

Under Fifth, Sixth and Seventh Propositions as above set out.

For statements hereunde- see appellant's Second Assignment of Error, which was adopted as a proposition, additional proposition under Second Assignment of Error and Statement as the same appear on pages 7 to 18 of appellant's brief.

Authorities.

See Authorities on pages 17 and 18 of appellant's brief.

76 Eighth.

The Honorable Court of Civil Appeals erred in overruling and not sustaining appellant's Third Assignment of Error.

Ninth.

The Honorable Court of Civil Appeals erred in overruling and not sustaining the First Proposition under appellant's Third Assignment of Error.

Tenth.

The Honorable Court of Civil Appeals erred in overruling and not sustaining the additional propositions under appellant's Third A-signment of Error.

Eleventh.

The Honorable Court of Civil Appeals erred in overruling and not sustaining the second additional proposition under appellant's Third Assignment of Error.

Statement.

Under Eighth, Ninth, Tenth and Eleventh Propositions as above set out.

For Statement hereunder see Appellant's Third Assignment of error and the propositions and statements thereunder as same appear on pages 25, 26 and 27 of appellant's brief.

Twelfth.

The Honorable Court of Civil Appeals erred in overruling and not sustaining appellant's Fourth Assignment of Error.

Thirteenth.

The Honorable Court of Civil Appeals erred in overruling and not sustaining appellant's additional Proposition under its Fourth Assignment of Error.

Fourteenth.

The Honorable Court of Civil Appeals erred in overruling and not sustaining appellant's Second Additional Proposition under
77 its Fourth Assignment of Error.

Fifteenth.

The Honorable Court of Civil Appeals erred in overruling and not sustaining appellant's Third Additional Proposition under its Fourth Assignment of Error.

Sixteenth.

The Honorable Court of Civil Appeals erred in overruling and not sustaining appellant's Fourth Additional Proposition under its Fourth Assignment of Error.

Statement.

Under Twelfth, Thirteenth, Fourteenth, Fifteenth and Sixteenth Propositions as above set out.

For Statement hereunder see Appellant's Fourth Assignment of Error and propositions and statement thereunder as same appear on pages 28 and 29 of appellant's brief.

Authorities.

Same as on page 29 of appellant's brief.

Seventeenth.

The Honorable Court of Civil Appeals erred in overruling and not sustaining appellant's Fifth Assignment of Error.

Eighteenth.

The Honorable Court of Civil Appeals erred in overruling and not sustaining additional proposition under appellant's Fifth Assignment of Error.

Statement and Authorities.

Under Seventeenth and Eighteenth Propositions as above set out.

For Statement and authorities hereunder see appellant's Fifth As-

signment of Error and propositions, statement and authorities thereunder as same appear on pages 32 and 33 of appellant's brief.

Nineteenth.

The Honorable Court of Civil Appeals erred in overruling and not sustaining appellant's Sixth Assignment of Error.

78 Statement and Authorities.

For statement and authorities hereunder see appellant's Sixth Assignment of Error, together with statement and authorities thereunder as the same appear on pages 33, 34 and 35 of appellant's brief.

Twentieth.

The Honorable Court of Civil Appeals erred in its opinion handed down in this case on the 5th day of December, 1918, in holding that, "The Jury could also conclude from the evidence that the point of the arm of the mail crane extended within fourteen inches of the side of the cab."

Statement.

On page 9 of the opinion of this Court the language as above set forth is used.

There was no evidence as to what was the actual distance between the side of the cab and the mail crane.

Anderson, a witness for the plaintiff, testified that his, Anderson's, hat was displaced by the mail sack or point of the crane, that he was standing between the engine and the tank and had hold of the hand holds, one on each side and was looking back, leaning out over the side of the cab; that he could have swung out a foot and a half and he was looking back when his hat was struck; that he should judge that at the time his head was out about fourteen inches from the side of the engine tank and cab." (S. F., p. 2.)

That fourteen inches was just an estimate. It may be fifteen, eighteen or nineteen inches, he wouldn't say. S. F., p. 3.

There was no evidence as to what part of his hat was hit, whether it was the brim or other portion.

Twenty-first.

The Honorable Court of Civil Appeals erred in its opinion in holding that "The mail pouch could be reached and taken by the hook, the other portion of the device at any distance between twenty-five and twenty-nine inches."

79 Statement.

The Court of Civil Appeals on page 9 of its opinion, used the language above set out.

Neeley, a witness for plaintiff, testified that he had not seen any cars but what the hook extended out about twenty-nine inches from the side of the car. (S. F., p. 6.)

That he couldn't catch a mail pouch with this hook over twenty-nine inches, anything within twenty-nine inches he could; that is, counting on the rocking of the train, that it might rock two or three inches; if you could catch it at twenty-nine inches and the train rocked it would pass inside and miss it. Outside of the rocking of the train you could catch it at twenty-nine inches. As to whether you could catch it with absolute safety within twenty-five inches would depend on the rocking of the train. If it rocked more than four inches you could not. If the track was in good condition and didn't rock you could catch it at twenty-nine inches. The witness didn't think that between here and Tucson it would rock three inches. (S. F., p. 7.)

He further testified that in order to have uniformity the Post Office Department fixes the distance of the cranes from the equipment and the length of the hooks so the same will take a sack off a crane in Arizona, New Mexico or in Kansas; that if a railroad company erects cranes and uses hooks it does so in accordance with Government regulations. (S. F., pp. 7 & 8.)

Twenty-second.

The Honorable Court of Civil Appeals erred in its opinion in holding that "From the evidence of the witness Neeley, the Railway Mail Agent on that division of the road, it is established that the devices could be so placed and used and the mail pouch taken at a distance of twenty-nine inches from the side of the train."

Statement.

The Court of Civil Appeals on page 9 of its opinion used
80 the language quoted.

For further statement hereunder see statement under the Twentieth and Twenty-first Propositions of this motion.

Twenty-third.

The Honorable Court of Civil Appeals erred in its opinion in holding that the testimony of the witness Mathews that the crane at Carney was erected and maintained in conformity with the Postal regulations, was a mere conclusion and not a statement of facts.

Statement.

The witness Matthews was shown to be division engineer for the Southern Pacific Company between the Rio Grande river and the Colorado River, that is between El Paso and Yuma; that he had lived in Tucson for nine years and had been working for the Southern Pacific Company eighteen years; he testified that the crane at

Carney was manufactured by the Columbia Mail Crane Company of Ohio; that he had reason to know that this particular crane and the general line of cranes are within the requirements of the Government because the Government had made objection to the setting of cranes on this division and the Company had to re-set them to meet the requirements. (S. F., pp. 11 and 12.)

Twenty-fourth.

The Honorable Court of Civil Appeals erred in its opinion in holding that there was no evidence other than that of the brakeman Anderson as to the distance of the arm of the crane from the side of the cab.

Statement.

Plaintiff's witness, Neeley, testified that, "There is a standard distance all cranes are from the side of the car. They are all the same distance exactly and are made so by Postoffice regulations." (S. F., p. 7.)

Anderson testified that the crane in question went on the same basis as any other, that it was like all of the balance of them. (S. F., p. 3.)

G. A. Thumm, an engineer of long experience, testified that he went by Carney the night Linder was struck and took particular notice of the crane to see if it was close as he had read of the accident to Linder and he did not consider it in close proximity to the track. (S. F., p. 13.)

Twenty-fifth.

The Honorable Court of Civil Appeals erred in its opinion in holding that even though the evidence was sufficient to show that the crane was placed at whatever distance Postal regulations required, still that fact alone did not have the effect to exclude other evidence on the issue of negligence and establish the fact that the crane was placed at a reasonably safe distance from the engine but the question of negligence would still be open for the Jury to determine from all of the evidence.

Statement.

The Court of Civil Appeals on page 10 of its opinion, held substantially as above set forth.

Twenty-sixth.

The Honorable Court of Civil Appeals erred in its opinion in holding that "The Jury could well have concluded from the evidence that Linder was out from the cab not exceeding fourteen inches when the hook or other part of the device could have taken the mail from the crane at as much as twenty-nine inches."

Statement.

From the statements hereinbefore set forth in this motion we submit that this court is in error in holding that the Jury might have concluded from the evidence that Linder was out from the cab not exceeding fourteen inches, and also that the hook could have taken the mail from the crane at as much as twenty-nine inches."

Twenty-seventh.

The Honorable Court of Civil Appeals erred in its opinion
82 handed down in this case in holding that the evidence was sufficient to establish negligence on the part of the defendant proximately causing the accident to Linder.

Twenty-eighth.

The Honorable Court of Civil Appeals erred in its opinion in holding that the evidence did not establish that Linder assumed the risk.

Twenty-ninth.

The Honorable Court of Civil Appeals erred in its opinion in holding that the defendant would be guilty of negligence notwithstanding it erected and operated its cranes strictly under the requirements of and according to the regulations of the Postoffice department.

Remarks.

We respectfully submit that there was no evidence of negligence upon the part of the defendant company. The uncontroverted evidence shows that the crane in question was equipped in conformity with the regulations of the postoffice department and at the same distance at which all other cranes were erected; that there *were* no difference between this and any *tochr* cranes on the Southern Pacific or other lines; that while the Postoffice Department did not require railroad companies to erect cranes, if it did so, it must erect them in conformity with Postoffice requirements. This is a matter of common knowledge that the very necessity of the case requires transcontinental railroads, like that operated by the defendant, to run fast trains and the Postoffice Department would not tolerate or permit these trains to pass without taking up the mail; that there are many small stations along the line at which it would be impossible to have these passenger trains stopped and from the very necessity of the case the railroads have to operate mail cranes. It is not an issuable question as to whether railroads should or should not operate mail cranes.
The very necessity of things require that they do. The evi-
83 dence in this case establishes beyond controversy that the Government requires mail cranes to be built at a standard distance from the track and in conformity with its specifications; and we

submit that there is no evidence upon which to predicate a finding that the crane in question was in too close proximity to the track. If it were said to be true that the occurrence of the accident would raise a presumption of lack of care calling upon the defendant to produce evidence to rebut it, the defendant has overwhelmingly met this requirement. It has shown from the mouths of plaintiff's own witnesses that the crane in question was built in conformity with the Postoffice requirements and the distance from the track required by the Postoffice requirements and the same distance as the other cranes on the line.

Anderson testified that the last time he saw Linder he had not gotten entirely in the cab window; that he was getting ready to prepare himself to get in through the window; that the last position he, witness, saw him in, he, Linder, was standing right in front of the cab window, outside, figuring on going in; that he didn't see him inside of the cab prior to the time he was struck. (S. F., pp. 2 & 3.)

That when he saw Linder after the accident he, Linder, was sitting in his seat, with his arm and head out of the cab, dropped over; that the way he got into the cab when he threw himself in the crane could be two and one half feet away and hit him; that he, witness, didn't mean to say that deceased was struck while going into the cab from the running board. (S. F., pp. 3 & 4.)

The case at bar is very different from the case of M. K. & T. Ry. Co. vs. Williams, 117 U. S. 1043, passed upon by the Supreme Court in 125 S. W. 881.

In the Williams case the evidence showed to a mathematical certainty from actual measurements that the distance between the ends of the wooden beams where the iron clips on which the mail sack was hung and the side of the car was only 13¾ inches; that the natural
84 swing of the engine on its springs when the track was in good repair was four inches, which, taken from 13¾ inches leaves nine and three-fourths inches as the clearance when the track was in good repair. It was also shown as stated by the Court of Appeals 117 S. W. 1146, that the condition of the track at the place of the accident was such as to cause an engine to sway so that the cab of the engine would extend 12 inches closer to the crane than it would if standing upright, thus as the court said causing the cab to almost, if not quite, come in contact with the crane. It was admitted and the undisputed evidence showed as stated by the Court of Civil Appeals in the Williams case that the mail hook or catcher bar extended out from the car 32 inches and that it would take up mail just so the catcher bar extends beyond the mail sack; that the evidence in the Williams case showed that the cranes were not set the same distance from the track.

The evidence also showed in the Williams case that the track was in bad condition, which is not an issue in this case.

There was no evidence whatever in the Williams case as far as the record shows that the crane was built in conformity with the Government requirements.

Judge Williams, in passing upon the case, says:

"The distance between the end of the beam, contact with which killed Williams, and the side of the mail pouch, which is the same

as that between the beam a*b*d the side of Williams' cab, and also the distance for which a catcher bar extended outward were shown, from which it appears mathematically that the beam might have been put further from the sides of cars and cabs of engines and still have allowed the end of the catcher bar to extend beyond the mail sack. The evidence also indicates that these catcher bars are not of uniform length and that all of the cranes are not located the same distance from the track."

How different are the facts in the instant case. In the case at bar it is not shown how close the mail crane was to the side of the car but it was shown beyond controversy that the crane at Carner was the same distance as all of the other cranes and was in
85 conformity with the requirements of the United States Postoffice Department.

Anderson says his hat was struck either by the mail crane or mail sack. In falling the mail sack may have fallen towards the car. He estimates that he was leaning out about 14 inches, maybe 15 or 19 inches. How broad his brim was, which apparently was struck, is not shown. Whether the cab at the time in its swinging motion was swinging towards or from the mail crane is not shown. There is no evidence, we submit, from which the Court could conclude that the mail crane was too close to the track. Even though it had been too close it was built in conformity with the requirements of the United States Government as promulgated in its postal regulations. It was beyond controversy a necessary contrivance at a way station on a transcontinental line. Plaintiff, himself, an experienced engineer, had passed this place many times and had taken up mail on trains which he was operating.

We respectfully submit that there was no evidence of negligence to be submitted to the Jury and that the uncontroverted evidence showed that the deceased assumed the risk.

Appellant shows to the Court that Messrs. George E. Wallace and W. S. Berkshire are the attorneys for appellee in this case; that their residences and Postoffice addresses are El Paso, Texas.

Wherefore, appellant prays the Court that the judgment and opinion rendered by this Honorable Court on the 5th day of December, 1918, affirming the judgment of the Trial Court be set aside and that it be granted a rehearing herein and that upon such rehearing the judgment of the Trial Court be reversed and the case remanded.

BEALL, KEMP & NAGLE,
Attorneys for Appellant, Southern Pacific Company.

December 18th, 1918.

We acknowledge receipt of a true copy of the foregoing motion, accept service of same and waive issuance and service on us
86 of certified copy thereof and agree that after five days from date of the filing of this motion the Court may proceed to pass upon the same.

GEO. E. WALLACE,
Attorney for Appellee, W. S. Berkshire, Administrator of the Estate of William A. Linder, Deceased.

Order of the Court of Civil Appeals, El Paso, Texas, Submitting and Overruling Appellant's Motion for a Rehearing.

Recorded in Minutes of said Court, in Book Two, at Page 406.
Motion No. 1293/891.

SOUTHERN PACIFIC COMPANY, Appellant,

vs.

W. S. BERKSHIRE, Admr., Appellee.

Appeal from the District Court of El Paso County, Texas.

Thursday, January 2nd, 1919.

Appellant's motion for a rehearing, submitted.

On this day coming on to be heard the appellant's motion for a rehearing, and the Court having considered the same, is of the opinion that the same should be overruled.

Wherefore, it is considered, adjudged and ordered that the appellant's motion for a rehearing be, and the same is hereby, in all things overruled.

57 In the Supreme Court of Texas.

No. —.

SOUTHERN PACIFIC COMPANY, Plaintiff in Error,

vs.

W. S. BERKSHIRE, Temporary Administrator and Personal Representative of the Estate of William A. Linder, Deceased, Defendant in Error.

Petition of Southern Pacific Company for Writ of Error.

To the Supreme Court of Texas:

Now comes your petitioner, Southern Pacific Company, and respectfully presents this its Petition for a Writ of Error to the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas, in the above cause, which in said Court of Civil Appeals was styled, Southern Pacific Company, appellant, versus W. S. Berkshire, Temporary Administrator and Personal Representative of the Estate of William A. Linder, deceased, Appellee, numbered 891 on the docket of said Court of Civil Appeals to reverse and correct the errors on questions of law by said Court of Civil Appeals in said cause committed, wherein said Court of Civil Appeals held differently from prior decisions of the Supreme Court and other Courts of Civil Appeals upon questions of law, and especially held differently from the

Supreme Court on the law of assumed risk as set forth in the
88 case of Missouri Pacific Railway Company versus Somers, 9th Southwestern, page 741; and wherein the said Court of Civil Appeals in this case committed errors of law of such importance to the jurisprudence of the State as to require correction by the Supreme Court, said holding of said Court of Civil Appeals not being in a case in which the jurisdiction of the Court of Civil Appeals is made final by statute.

This was a suit in the District Court of El Paso County, Texas, 41st Judicial District, by W. S. Berkshire, as temporary administrator and personal representative of the estate of William A. Linder, deceased, against the Southern Pacific Company for the use and benefit of the surviving wife and children of the said Willam A. Linder. Plaintiff alleged that on July 3, 1916, the deceased, William A. Linder, was employed by the defendant as a locomotive engineer, running between El Paso, Texas, and Lordsburg, New Mexico, and that on said date, while operating a locomotive drawing one of the defendant's trains, between El Paso and Deming, New Mexico, which train was loaded with soldiers, the deceased was struck by a mail crane at Carney, New Mexico, which crane was alleged to be in dangerous proximity to the track at said point and in consequence of being so struck the said William A. Linder died on the 11th day of July, 1916. Plaintiff alleged that defendant was negligent in placing and maintaining the mail crane or some portion or part of same in such close proximity to the track as to strike the deceased while occupying his usual and customary position on the engine, and plaintiff alleged negligence on the part of the defendant in not placing and maintaining the mail crane at a reasonable safe distance from the track so that the same would not strike or come in contact with the engineer operating said train through said station; and also alleging that the defendant was negligent in not warning the deceased of the close proximity of the mail crane to the side of the engine and in not keeping an agent at Carney, New Mexico, to see that
the mail was hung out at the proper time and in not direct-
89 ing the party who hung the mail sack out to refrain from hanging same on the mail crane for any train but the mail train. (Tr., pp. 1, 9.)

Defendant answered by general denial and by plea that the deceased met his death while in the employment of the defendant company while engaged in Interstate Commerce and that his death was due to risks and dangers assumed by him. (Tr., pp. 9 & 10.)

On the trial of the case before a Jury a verdict was rendered for plaintiff in the sum of Fifteen Thousand ($15,000) Dollars, divided as follows:

Five Thousand ($5,000.00) Dollars for the benefit of the wife, Three Thousand ($3,000.00) Dollars for the benefit of each of the three children, and One Thousand ($1,000.00) Dollars for conscious pain, upon which verdict judgment was rendered. (Tr., p. 16.)

A motion for a new trial was duly filed (Tr., pp. 26 to 33) and was over-ruled on January 24, 1918, (Tr. pp. 33 & 34), to which action

of the Court defendant excepted and gave notice of appeal; and, thereafter, in due time defendant filed its supersedeas bond.

The Court of Civil Appeals, on December 5th, 1918, entered judgment and handed down an opinion, in all things, affirming the judgment of the Trial Court.

Thereafter, in due time, the Southern Pacific Company filed its motion for re-hearing, complaining of all matters and things set up in this Petition for Writ of Error, which motion for re-hearing was by the Court of Civil Appeals on January 2nd, 1919, in all things over-ruled.

90 Grounds of Jurisdiction.

This case is one in which the jurisdiction of the Court of Civil Appeals is not final under Article 1591 of the Revised Statutes of 1911, same being a suit for damages for personal injuries in a sum greater than One Thousand ($1,000.00) Dollars, to-wit, in the sum of Thirty Thousand ($30,000.00) Dollars. (Tr., p. 8.)

The Supreme Court has jurisdiction because

(*a*) As your petitioner conceives and here avers the Court of Civil Appeals in its decision in over-ruling appellant's, Southern Pacific Company's, first, second and third assignments of error and holding that the deceased did not assume the risk held differently from prior decisions of the Supreme Court and other Courts of Civil Appeals, and especially held differently from the Supreme Court in the case of Missouri Pacific Railway Company vs. Somers, 9th Southwestern, 791; the Court of Civil Appeals in this case holding that deceased did not assume the risk notwithstanding the uncontroverted evidence showed that the mail crane at Carney, New Mexico, with which deceased came in contact while operating his train as a locomotive engineer was the same distance from the side of the car that all other mail cranes were (S. F., pp. 7 & 8, and S. F., pp. 11 & 12); and the uncontroverted evidence showing that in August, 1914, the deceased made twenty trips over the track in question—in September nineteen trips—in October twenty-two trips—in December sixteen trips—and that during the six months immediately preceding the accident deceased made one hundred and fifty-four trips past the point of the accident and some of these trips being as engineer on a freight train and others of them being as engineer on passenger trains. (S. F., pp. 9 & 10.)

91 (*b*) The Court of Civil Appeals in affirming the judgment of the Trial Court and in holding that there was evidence of negligence upon which to base a judgment when the uncontroverted evidence showed that the crane in question was the same distance as all other cranes and was built according to the United States postal regulations and there being no evidence as to the exact distance the crane was from the side of the car, committed an error of law of such importance to the jurisprudence of the State as to require correction by the Supreme Court.

(*c*) The Court of Civil Appeals in its opinion affirming the case in holding that even though the crane in question was placed at the

distance required by the United States postal regulations, the same would not have the effect of establishing the fact that the crane was placed at a reasonably safe distance from the engine but the question of negligence would still be open to the Jury to determine from all of the evidence, committed an error of law of such importance to the jurisprudence of the State as to require correction by the Supreme Court.

First Assignment of Error.

The Court of Civil Appeals erred in over-ruling appellant's First Assignment of error, which is as follows, to-wit:

"The Court erred in refusing to give defendant's special Charge Number One, which, omitting its formal parts is as follows:

'GENTLEMEN OF THE JURY: In this case you are instructed to return a verdict in favor of the defendant, Southern Pacific Company.'" (Tr., p. 27, p. 4 of appellant's brief.)

92 Second Assignment of Error.

The Court of Civil Appeals erred in over-ruling appellant's Second Assignment of Error, which is as follows, to-wit:

"The Court erred in refusing to give defendant's Special Charge Number One, which, omitting its formal parts, is as follows:

'GENTLEMEN OF THE JURY: In this case you are instructed to return a verdict in favor of the defendant, Southern Pacific Company.'

For the reason that the undisputed evidence shows that any injuries which the deceased, Linder, received were the result of risks and dangers ordinarily incident to his employment as engineer while operating one of defendant's engines and trains engaged in Interstate Commerce, which risks and dangers he assumed." (Tr., p. 27—pages 7 & 8 of appellant's brief.)

These two Assignments of Error relate to the same subject and are grouped.

Proposition under the Foregoing Assignment of Error.

The uncontroverted evidence showing that the deceased was an experienced engineer who had made ninety-nine trips over the defendant Company's line by the place of the accident from July 1st, 1914, to December 21st, 1914, and had made one hundred and fifty-four (154) trips by the place of the accident during the six months immediately preceding said accident, during all of which time the said mail crane was in the same position and located as it was at the time of the accident, and the uncontroverted evidence showing that said trips were made on both passenger and freight trains, there being no evidence that said crane was located differently from any

other crane but the uncontroverted evidence showing that it was located similar to other cranes, the deceased assumed the risk of being struck by said mail crane as a matter of law.

Statement.

The defendant at the proper time requested the Court to give its Special Charge Num'er One, which is as set out in the foregoing assignments of error. (Tr., p. 23), which charge the Court refused, to which action of the Court the defendant in due and proper time excepted for the reason that there was no evidence that de-
93 fendant was guilty of negligence proximately causing the injury or death of deceased, and because the uncontroverted evidence showed that the crane in question was constructed in the usual and customary way and at a safe distance from the track and the deceased was an experienced engineer and had been running over the road in question for a number of years and was familiar with the condition of the crane in question and knew and appreciated the dangers in connection therewith, the undisputed evidence showing that the deceased came to his death while engaged in Interstate Commerce and the undisputed evidence showing that his death was caused by ricks and dangers assumed by him. (Tr., pp. 21 & 22.) It was agreed between the parties to the suit that at the time of his death the deceased was engaged in operating an engine engaged in Interstate Commerce. (S. F., p. 18.)

Plaintiff's witness Anderson testified:

"I seen him get out on the running board, which is placed for that purpose, and get on his hands and knees and look to see if it was getting hotter (referring to same part of the engine). Afterwards I seen him get up and start through the cab. At that time I looked back. I was looking back at the side of the train, trying to discover the hot box. I was standing up with my hands on both grab irons, right and left, in the gangway, looking out down the side of the train. Just then this mail sack fell. At the time it fell, either the crane or the sack knocked my hat from the left to the right side, and I got this drop of blood on my face. Linder was unconscious, with his right arm and pretty near half of his body outside of the cab, leaning with the right side and arm over the arm rest of the engine. I should judge that at the time, my head was out about 14 inches from the side of the engine tank and cab * * * At the time my hat was struck, I felt the blood, and noticed the sack going down at the same time, and the blood hit me on the side of the face. When I turned around to Mr. Linder, he had a cut on the right side, above the ear, about an inch over the right ear, to my knowledge. I shut the throttle off and started applying the brakes." (S. F., pp. 1-2.)

Witness, on cross-examination, further testified:

I have been up and down that division for the last seven years, (referring to that portion of the track) not in the train service, part of the time I was stationary engineer. I have known that crane to be there over eight years myself. I don't know what length of

time Mr. Linder had been running over that division, but a number of years. The crane stands on the same basis as any other
94 it is like all the balance of them. I never measured the distance it was from the track, but I should judge 14 inches from the parallel part of the cab. * * * The engine was going West and Mr. Linder was on the north side, and he was struck on the right side, about an inch above the right ear. The cab window and the coach line behind are supposed to be parallel * * * this was an ordinarily constructed engine. Mr. Linder had to have his head partly out of the cab window to be struck." (8. F., p. 3.)

On redirect examination, witness further testified with reference to his figures and the distance:

"That is just an estimate, it may be 15, 18 or 19, I don't know. When I found Mr. Linder, he was siting in his seat, with his arm and head out of the cab, dropped over. * * * There are no obstructions other than the mail crane, on the right hand side of this track at Carney, except a tool-house, and that sits, I would judge 12 feet away from the track. That is all outside of the signboard, for the station, and that is 18 to 25 feet from the track. We took Mr. Linder to Deming." (8. F., pp. 3-4.)

On redirect examination, witness further testified:

"At the time of the accident the train was going on an average of 35 miles an hour. If the engineer wanted to look at the driving pin through this window, he would have to lean out, 14 inches away, to see it." (8. F., p. 5.)

Witness J. A. O'Brien testified that he was a conductor and was in charge of the train Mr. Linder was on, on July 3, 1916, at the time of the accident; that the accident happened at Carney, New Mexico; he further testified:

"We reached there at 9:15 A. M. I was in the caboose. The train stopped at Carney, it stopped rather suddenly. * * * The head brakeman, Anderson, came running back and says 'Engineer Linden is hurt' * * * I found the engineer laying upon the seat box with his head kinder laying back and the blood trickling down." (8. F., pp. 16-17.)

Witness, G. A. Thumb, testified that he had been a locomotive engineer in the employ of the Southern Pacific since 1888. At the time, he testified that he was running a passenger train, and further said:

"I have run on No. 1 and No. 2, they are trains coming and going to Chicago. No. 1 goes West and No. 2 east. I think the time of No. 1 at Carney, New Mexico, in July, 1916, was about 9:05 or 9:08, some
95 place along there—a little after 9, I am not positive. Carney is 11 miles east of Deming. When I operated No. 1 it picked up mail at Carney. I am familiar with the mail crane at Carney, and there are others like it at Anapra, about 7 miles west, at Lanark, 28 miles west of here, at Alden, 44 miles, at Cambria, 62 miles, at Mindue, about 74 miles, and at Mesa, that is about 3 miles further west that Mindus, then the one at Carney, about 3 miles West of Mesa. That is all between here and Deming. Going West they are all on the righthand side of the track, that is the North

side according to the points of the compass. Those cranes are approximately the same distance from the track, so near as I can tell as engineer. I was familiar with the cranes along there in July, 1916, and I didn't notice any difference in the crane at Carney from the others, or that it was too close. I went by that night, after 12 o'clock, the day he (Linder) was struck. I saw the crane, and I didn't consider it in close proximity to the track. I had read in the paper that he had been struck, and took particular notice to see if it was close. As to the windows in an engine, in this corner (indicating) there is a window looking straight ahead, it is big enough for me to squeeze through, you can go out on the running board through it. The side of the cab comes along here and there are two windows * * * we call them storm windows. There is an arm rest to lean on, and you can look out this window. It is optional with the engineer whether he leans out of the cab and looks through this window or sits without leaning out and looks through the window ahead. * * * I could see that mail crane at Carney a half mile down the track. East of Carney for approximately 20 miles the track is straight, it is kind of rolling, right at Carney it is considered to be a flat. West of Carney about 500 yards, or a little more, a curve commences and the track curves to the left. Going West, I could see the mail crane for a half mile east of Carney. I wouldn't be apt to see a sack on it, but the crane I could, it is painted white." (S. F., pp. 13-14.)

On cross-examination witness testified:

"You can see the crane a half mile away, it is white, but the sack is generally dirty from being on the ground and you can't see it that distance, but within five or six hundred feet you can see the sack." (S. F., p. 15.)

Witness further testified on re-direct examination:

"Mr. Linder took his chances running extra on passenger trains, the same as the others. If he happened to be first out, and a regular man laid off, they sent him on a passenger train." (S. F., p. 15.)

Witness L. A. Thompson testified that he lived near Carney, New Mexico, about a mile and a half away; that he was a salesman for Krakauer, Zork & Moye, and was in July, 1916; that at that time he was assistant postmaster; and that he was never an employe of the Southern Pacific Company. He testified as follows:

"My duties as assistant postmaster were to receive mail and
86 deliver it to patrons, and to hang the mail for the train, No. 1 was the one I hung it for. No. 1 was scheduled to pass through Carney at 9:15 or 9:16 in the morning. Carney is about 11 miles east of Deming. * * * I recall the day that the accident befell Mr. Linder from which he died, but I didn't see it. I hung the mail on that particular day, I hung it probably from 5 to 15 or 20 minutes before No. 1's time, I don't recall exactly the time. There is no agency at Carney, and no telegraph station, and no operator or dispatcher. At that time we had no way of telling whether the train was on time or not, we have a phone in our house, but it was out of order. The Government furnishes us with no means there of letting us know with reference to the trains. I hung mail out in time for No. 1, and I did not know on that particular morning that there was a passenger train running ahead of No. 1. * * *

I suppose I took my orders from the government * * * the only orders I could take were from the government, I was not employed by the railroad company or under its direction." (S. F. pp. 12-13.)

Plaintiff's witness Neeley testified:

"I am in the railway mail service. My run is from here to Tucson. I work on the train known as the 'California.' Nos. 1 and 2, which runs from Los Angeles to Chicago, over the Southern Pacific, Southwestern and Rock Island. It runs over the Southern Pacific from Deming to El Paso." (Then follows testimony of witness as to mechanism of mail hook, handling of hook, etc.) (S. F., p. 6.)

Witness on cross-examination further testified that the same mail cars coming in here on No. 2 from Los Angeles, are the same class of cars, interchangeable equipment, as those going to Chicago. And further testified.

"In emergencies sometimes the Southern Pacific car goes on through. * * * Starting from Los Angeles on No. 2, and following the equipment to Chicago, over the Southern Pacific, El Paso and Southwestern and Rock Island, this same car with the same hook where the man in the car throws it out, takes mail from all cranes upon which mail is located. Naturally, there is a standard distance all the cranes are from the side of the car, they are all the same distance exactly, and are made so by postoffice regulations * * * the same hook which will take a sack off a crane in Arizona or New Mexico, will take it as it goes through Western Kansas. The company to put up the cranes, they can either stop the train and pick up the mail, or put up the crane, it is optional with the railroad company which they will do. But I understand, that if they do erect them and use the hooks, they do it according to government regulations." (S. F., pp. 7-8.)

Defendant's witness Haley testified:

"I live at Tucson, Arizona. I am assistant trainmaster. As
97 such, I have access to the records, time slips and reports made by the various engineers running on the Tucson division out. I knew Mr. Linden in his lifetime, perhaps for 15 years. I first knew him in Tucson, for perhaps 8 or 9 years, and he afterwards moved to El Paso. While he was in Tucson, his run was both east and west, to Yuma and Lordsburg."

Here counsel for defendant introduced and read in evidence the records of the company, or time slips, showing the claim for time and number of trips made by W. A. Linder during the years 1914 and 1915.

"In August, 1914, he (Linder) made 20 trips over the track in question, in September 19 trips, in October 22 trips and in December 16 trips, making a total of 99 trips from July 1, 1914, to December 31, 1914 * * * The records for 1916 show that from January 1st to July 1st of that year—during the six months immediately preceding his accident on July 3, 1916—that Mr. Linder made 154 trips past the point of the accident." (S. F., pp. 9-10.)

Witness further testified:

"Part of those trips were on freight trains, but part were on passenger too." (S. F., p. 10.)

Defendant's witness Matthews testified that he is division engineer at Tucson for the defendant company, and that he had supervision and maintenance of the track and the structures alongside of the track between the points mentioned, and further testified:

"This particular crane at Carney was manufactured by the Columbia Mail Crane Company of Ohio." (8. F., p. 11.)

Referring to the postal regulations, witness read from Section 1355, as follows:

"At all points at which trains do not stop where the Post Office Department deems the exchange of mails necessary a device for the receipt and delivery of mails satisfactory to the department must be erected and maintained; and pending the erection of such device the speed of trains must be slackened so as to permit the exchange to be made with safety."

Witness further testified:

"There was a crane erected and maintained at Carney in conformity with this section of the postal regulations. As to the distance of the cranes from the track, I have reasons for knowing that this particular one, and the general line of them, are within
38 the requirement of the government, because the government has made objections to the setting of cranes on this division, and we have had to re-set them to meet the requirements. The railroad furnished the equipment for the mail cars, subject to the specifications of the postal department. The cranes and entire equipment made in conformity therewith." (8. F., pp. 11-12.)

Authorities.

Bingham, Administrator, vs. N. Y., P. & N. R. R. Co., 241 U. S., 251 (60 L. Ed. 977).
Reese vs. P. & N. Ry. Co., 239 U. S., 463 (60 L. Ed. 384).
Jacobs vs. Southern Railway Co., 241 U. S., 229 (60 L. Ed. 970).
Boldt vs. Penn. R. R. Co., 245 U. S., 441.
Ry. Co. vs. Horton, 233 U. S. 592 (34 Supt. Ct. 635; 58 L. Ed., 1089).
Ry. Co. v. Crockett, 234 U. S. 727 (34 Sup. Ct. 897; 58 L. Ed. 564).
Missouri Pacific Ry. Co. v. Somers, 9 S. W., 741.
H. & T. C. Ry. Co. vs. Smallwood, 171 S. W., 292.
G. C. & S. F. Ry. Co. vs. Cooper, 191 S. W., 379.
Ry. Co. vs. Allen, 106 S. W., 441.
Eggers vs. Ry. Co., 13 S. W., 540.
Bennett vs. Ry. Co., 89 Tex., 72 (33 S. W., 334).
Ry. Co. vs. Dickens, 170 S. W., 835.
Ry. Co. vs. Sauter, 223 Fed., 604.
Kenney vs. Maddaugh, 118 Fed., 209.
Marramore vs. Cleveland R. Co., 96 Fed., 298 (48 L. R. A., 69).
Chanton R. Co. vs. McDade, 191 U. S., 64.
Schlemmer vs. Buffalo R. & P. Co., 220 U. S., 590.
McCain v. Chicago, R. T. Co., 22 C. C. A., 99.
Ry. Co. v. Elliott, 5 C. C. A., 247.

Third Assignment of Error.

The Court of Civil Appeals erred in over-ruling appellant's Third Assignment of Error, which is as follows, to-wit:

"The Court erred in refusing to give defendant's Special Charge Number One, which is as follows:

'In this case you are instructed to return a verdict in favor of the defendant, Southern Pacific Company.'" (Tr., p. 27; Appellant's Brief, pages 25 & 26.)

Proposition under Third Assignment of Error.

The evidence being too vague and indefinite as to the distance of the mail crane from the side of the engine to raise an issue before the Jury the Court should have instructed a verdict in favor of the defendant.

99 Statement.

Same as under first and second assignments of error.

Authorities.

For authorities see authorities on pages 27 and 29 of appellant's brief.

Fourth Assignment of Error.

The Court of Civil Appeals erred in over-ruling appellant's Fourth Assignment of error which is as follows, to-wit:

"The Court erred in his main or general charge to the Jury as a whole, in submitting any issue of negligence to the Jury, because there is no evidence of any negligence on the part of defendant proximately causing any injury to deceased, Linder, which resulted in his death." (Tr., p. 29, Appellant's brief, page 28.)

This assignment is adopted as a proposition.

Statement.

For statement hereunder see statement under first and second assignments of error as set forth in the foregoing pages of this petition.

Authorities.

For authorities hereunder see authorities under Fourth Assignment of Error of appellant's brief on page 29 thereof.

Additional Proposition under Fourth Assignment of Error.

The evidence being uncontroverted that all of the mail cranes, including the one at Carney, were the same distance from the side of

the car and were made so by Post Office regulations there was no negligence shown on the part of the defendant in the manner of constructing and maintaining said mail crane.

Statement.

For statement hereunder see statement under first and second assignments of error as set forth in this petition.

Fifth Assignment of Error.

The Court of Civil Appeals erred in over-ruling appellant's Fifth Assignment of error, which is as follows, to-wit:

"The Court erred in submitting any issue of assumed risk to the Jury, because the deceased, Linder, assumed all risks ordinarily incident to the business in which he was engaged, that is, the business of a engineer, as well as all the risks and dangers which were open and visible, and the risks and dangers which he knew of or which in the ordinary discharge of his duties he must necessarily have acquired knowledge of; and the undisputed evidence shows that any injuries that deceased, Linder, received, were the result of risks assumed by him; and there was no issue of fact to submit to the Jury, and no issue of assumed risk to submit to the Jury." (Tr., p. 29, and page 32 of appellant's brief.)

This assignment is adopted as a proposition.

Statement.

For statement hereunder see statement under first and second assignments of error as set forth in the petition.

Sixth Assignment of Error.

The Court of Civil Appeals erred in over-ruling appellant's Sixth Assignment of Error, which was as follows, to-wit:

The Court erred in his main or general charge in submitting to the Jury the issue of assumed risk, because the undisputed evidence shows that the injuries received by the deceased, Linder, were the result of risks incident to his employment, while engaged in operating a train engaged in Interstate Commerce, and risks that did not arise or grow out of negligence on the part of defendant. (Tr., p. 29, and pages 33 and 34 of appellant's brief.)

This assignment is adopted as a proposition.

Statement.

For statement hereunder see statement under first and second assignments of error as hereinbefore set out.

Authorities.

For authorities hereunder see authorities on page 35 of appellant's brief.

101 Seventh Assignment of Error.

The Court of Civil Appeals erred in its opinion handed down in this case on the 5th day of December, 1918, in holding that, "The Jury could also conclude from the evidence that the point of the arm of the mail crane extended within fourteen inches of the side of the cab." (See Paragraph Twentieth, Appellant's motion for re-hearing in Court of Civil Appeals.)

This assignment is adopted as a proposition.

Statement.

On page 9 of the opinion of this Court the language as above set forth is used.

There was no evidence as to what was the actual distance between the side of the cab and the mail crane.

Anderson, a witness for the plaintiff, testified that his, Anderson's, hat was displaced by the mail sack or point of the crane; that he was standing between the engine and the tank and had hold of the hand holds, one on each side, and was looking back, leaning out over the side of the cab; that he could have swung out a foot and a half and was looking back when his hat was struck; that he should judge that at the time his head was out about fourteen inches from the side of the engine tank and cab." (S. F., p. 2.)

Eighth Assignment of Error.

The Honorable Court of Civil Appeals erred in its opinion in holding that "The mail pouch could be reached and taken by the hook, the other portion of the device, at any distance between twenty-five and twenty-nine inches." (Appellant's motion for rehearing, Paragraph twenty-first thereof.)

This assignment is adopted as a proposition.

102 Statement.

The Court of Civil Appeals, on page 9 of its opinion, used the language as above set out.

Neeley, a witness for plaintiff, testified that he had not seen any cars but what the hook extended out about twenty-nine inches from the side of the car. (S. F., p. 6.)

That he couldn't catch a pouch with this hook over twenty-nine inches, anything within twenty-nine inches he could, that is, not counting on the rocking of the train, that it might rock two or three inches; if you could catch it at twenty-nine inches and the

train rocked it would pass inside and miss it. Outside of the rocking of the train you could catch it at twenty-nine inches. As to whether you could catch it with absolute safety within twenty-five inches would depend on the rocking of the train. If it rocked more than four inches you could not. If the track was in good condition and didn't rock you could catch it at twenty-nine inches. The witness didn't think that between here and Tucson it would rock three inches. (S. F., p. 7.)

He further testified that in order to have uniformity the Post-office Department fixes the distance of the cranes from the equipment and the length of the hooks so the same hook will take a sack off a crane in Arizona, New Mexico or in Kansas; that if a railroad company erects cranes and uses hooks it does so in accord- with Government regulations. (S. F., pp. 7 & 8.)

Ninth Assignment of Error.

The Honorable Court of Civil Appeals erred in its opinion in holding that, "From the evidence of the witness Neeley, the railway mail agent on that division of the road, it is established that the device could be so placed and used and the mail pouch taken at a distance of twenty-nine inches from the side of the train." (Paragraph twenty-second of appellant's motion for rehearing.)

103 This assignment is adopted as a proposition.

Statement.

The Court of Civil Appeals, on page 9 of its opinion, used the language above set out.

For full statement hereunder see statement under the seventh and eighth assignments of error of this petition.

Tenth Assignment of Error.

The Honorable Court of Civil Appeals erred in its opinion in holding that the testimony of the witness Mathews that the crane at Carney was erected and maintained in conformity with the Postal Regulations, was a mere conclusion and not a statement of facts. (Appellant's motion for re-hearing, Paragraph twenty-third.)

This assignment is adopted as a proposition.

Statement.

The Court of Civil Appeals, on page 9 of its opinion, used the following language, "The witness Mathews testified that the crane at Carney was erected and maintained in conformity with the Postal Regulations. But this statement is more a conclusion than the statement of a fact."

The witness Mathews was shown to be division engineer for the Southern Pacific Company between the Rio Grande River and the Colorado River, that is, between El Paso and Yuma; that he had

lived in Tucson for nine years and had been working for the Southern Pacific Company eighteen years; he testified that the crane at Carney was manufactured by the Columbia Mail Crane Company of Ohio; that he had reason to know that this particular crane and the general lines of cranes are within the requirements of the Government because the government had made objection to the setting of cranes on this division and the Company had to re-set them to meet the requirements. (S. F., pp. 11 & 12.)

104 Eleventh Assignment of Error.

The Honorable Court of Civil Appeals erred in its opinion in holding that, "There was no evidence other than that of the brakeman Anderson as to the distance of the arm of the crane from the side of the cab." (Paragraph twenty-four of appellant's Motion for rehearing.)

This assignment is adopted as a proposition.

Statement.

On pages 9 and 10 of its opinion, the Court of Civil Appeals used the following language, "The Postal regulation introduced does not state the distance the crane must be from the track or coaches, nor does the evidence of any of the witnesses show the distance the postal regulations require the arm of the crane to be from the track or coaches. Nor is there any evidence in the record other than that of the brakeman Anderson as to the distance of the arm of the crane from the side of the cab."

Plaintiff's witness, Neeley, testified that, "There is a standard distance all cranes are from the side of the car. They are all the same distance exactly and are made so by Postoffice regulations." (S. F., p. 7.)

Anderson testified that the crane in question went on the same basis as any other, that it was like all of the balance of them. (S. F., p. 3.)

G. A. Thum, an engineer of long experience, testified that he went by Carney the night Linder was struck and took particular notice of the crane to see if it was close as he had read of the accident to Linder and he did not consider it in close proximity to the track. (S. F., p. 13.)

Twelfth Assignment of Error.

The Honorable Court of Civil Appeals erred in its opinion in holding that even though the evidence was sufficient to show
105 that the crane was placed at whatever distance postal regulations required, still that fact alone would not have the effect to exclude other evidence on the issue of negligence and establish the fact that the crane was placed at a reasonably safe distance from the engine but the question of negligence would still be open for the

Jury to determine from all of the evidence. (Appellant's motion for re-hearing, Paragraph twenty-fifth.)

Statement.

The Court of Civil Appeals on page 10 of its opinion used the following language:

"But if it should be held that the evidence was sufficient to show that the crane was placed at whatever distance the postal regulations required, still that fact alone would not have the effect to exclude other evidence on the issue of negligence and establish the fact that the crane was placed at a reasonably safe distance from the engine but the question of negligence, it being a question of negligence vel non, would still be open for the Jury to determine from all of the evidence."

Argument.

We respectfully ask the Court to read our argument on pages 19 to 25, both inclusive, and on pages 29 to 31, both inclusive, of our brief; also our argument on pages 10 to 13, both inclusive, as appears in our motion for re-hearing filed in the Court of Civil Appeals. To avoid repetition we do not repeat our said argument in this petition but respectfully ask the Court to read our said arguments as they appear in the foregoing pages of our brief and motion for re-hearing.

In connection therewith we desire to call the Court's particular attention to the case of Baugham v. Railway Co., above cited;
106 this case was decided by the Supreme Court of the United States long after the Swearingen case, cited by the Court of Civil Appeals, page 11 of its opinion. In the Baugham case the facts were that Baugham was killed while working as brakeman for the Railway Company; he was in the act of mounting a freight car which was being transferred from the wharf to a barge. He was killed by being crushed between the car being moved and other cars on the barge. There were four tracks on the barge. Between the outside and center tracks, of which there were two, there was sufficient space for an employe to mount in safety cars moving between those tracks. There was likewise enough space between the center tracks for some distance from where they entered the barge from the wharf; but these tracks gradually converged until space between them so diminished that cars being moved on one center track would almost touch those standing on the other center track. The roofs of the cars would sometimes touch. It was alleged that the Company was negligent by reason of this condition, and it was alleged that defendant should have warned deceased of the dangers and perils attendant upon his service as a brakeman on cars being transferred from the wharf to the barge.

Defendant demurred to the evidence; the demurrer was sustained. The Supreme Court held that deceased assumed the risk, and that the demurrer to the evidence was properly sustained, and affirmed

the case. The court further held that under the act of Congress (the Interstate act) the common law rule of assumption of risk applied.

In the Jacobs case, above cited, 240 U. S. 228 (60 Law Ed., p. 970) plaintiff got off his engine to get drinking water; in attempting to remount his train, he fell over a cinder pile and went under the engine; plaintiff testified he tripped over the cinders just before he went to get on the engine. That if he had fallen from some cause other than the cinders, he would have got out of the danger; that he was not conscious of any danger in coming in contact with
107 the cinders; that it was not in his mind at all. He said: "I knew the cinders were there but did not know it was dangerous. I had forgotten them being there at the time."

The Supreme Court held plaintiff to have in all respects assumed the risk. It held that the act of Congress made available the defense of assumed risk.

In the above cited case of Reese v. Ry. Co., 239 U. S., 463, plaintiff's decedent was killed while in the Railway Company's employ as fireman. Deceased was a capable, experienced fireman in a night switching crew, thoroughly acquainted with the conditions in his yards. He was killed by coming in contact with a freight car standing on a parallel track, while with his engine in motion he was attempting to get drinking water from a tap on the side of the tender where both tracks in the yard were occupying a highway, and were closer together than the standard distance. The court held that no negligence was shown and a verdict and judgment for defendant was affirmed.

It seems to us that these cases are a complete answer to contention that under the Federal Employe-s' Liability act deceased Linder did not assume the risk. They are unquestionably a complete reply to the statement by the Court of Civil Appeals that the Swearingen case applies.

It will be seen from an examination of the Reese case, supra, that the trial court determined as a matter of law that there was no evidence of negligence on the part of the defendant. In that case the defendant had maintained two tracks in Noble Street under ordinance of the city, according to plans approved by its officials, and the distance between these tracks was much less than the general standard adopted by the company and box cars moving thereon had barely room to pass. The United States Supreme Court, however, said that the mere circumstance of such condition is not
108 enough to support an inference of negligence where, as in the Reese case a necessity existed to utilize a public street. In the instant case it was shown by the uncontroverted evidence, that the mail crane in question was built according to the regulations of the United States Postal Department, and it is a matter of common knowledge that on a transcontinental line where necessity exists, in the public interest to operate fast through trains, some provision must be made for the taking of mail at small stations along the line other than the stopping of the train for the taking on of mail. It was shown that the railroad company either had to stop its train at Car-

ney and other similar places or erect mail cranes, and certainly the mere act of erecting mail cranes under the supervision and direction of the United States Postal officials was not an act of negligence on the part of the defendant.

In the Baugham case, supra, the court likewise determined as a matter of law, that the plaintiff was not entitled to recover, and the United States Supreme Court held that the trial court correctly so determined, in that the evidence showed that plaintiff himself had assumed the risk. In that case, the deceased was crushed by being caught between a moving car which he was ascending, and another car standing on the barge. Certainly the danger was no more manifest in that case than in this, and an inspection of the record shows that plaintiff was an experienced engineer, and had passed the crane in question many times; that he had made twenty trips over the track in question in August 15, 1, nineteen trips in September, twenty-two in October and sixteen in December, and that during the six months immediately preceding the accident, he had made 154 trips past the point of the accident, during some of which trips he was running a passenger train. (S. F., pp. 9-10.) Certainly he cannot be said to have been ignorant of the situation and danger, if any, especially in view of the uncontroverted evidence that
109 the mail crane at Carney was located at the same distance from the track as all of the other mail cranes on the line. Moreover, as is shown by the foregoing statement of facts, it was mere guess-work on the part of plaintiff's witness as to how far the mail crane was from the track, or how far it was from the side of the caboose.

We submit that under the uncontroverted evidence, the defendant was not guilty of any act of negligence, and that under the uncontroverted evidence, the deceased assumed the risk. It will not do to say, as is suggested by the court in discussing the Swearingen case (p. 11 of the Opinion of the Court), that an injured person might not at the time be thinking of the danger. For the United States Supreme Court says in the Jacobs case, supra, that "it would be going very far to say that a fireman on an engine, who knew of the custom of depositing cinders on the tracks, knew of their existence, and who attempted to move an engine with a vessel of water in his hands (holding not over a gallon), could be considered as not having appreciated the danger and assumed the risk of the situation because he had forgotten their existence at the time, and didn't notice them. We think his situation brought him within the rule of the cases."

The Jacobs case was long subsequent to the Swearingen case, and was a suit brought under the Federal Employers' Liability act. We believe that an inspection of the record will convince the court that under the uncontroverted evidence, the defendant was not guilty of negligence, and that the deceased himself assumed the risk.

Plaintiff in error represents that Messrs. George E. Wallace and W. S. Berkshire, both of whom reside in the City and County of El Paso, State of Texas, and whose residence and post office addresses

are El Paso, Texas, are attorneys of record for the defendant in error W. S. Berkshire, temporary administrator, as aforesaid.

Wherefore, plaintiff in error prays the court to grant your
110 petitioner a writ of error herein, and upon final hearing that the judgment of the trial court and Court of Civil Appeals be reversed and rendered in favor of plaintiff in error; or, if for any reason the said judgment of the trial court and Court of Civil Appeals cannot be rendered for plaintiff in error, that in such event the said judgment be reversed and the case be remanded for a new trial.

Respectfully submitted,

BEALL, KEMP & NAGLE,
Of El Paso, Texas, Attorneys for Southern Pacific Company, Plaintiff in Error.

We, the undersigned attorneys of record for the Defendant in Error, W. S. Berkshire, temporary administrator and personal representative of the Estate of William A. Linden, Deceased, hereby acknowledge receipt of a true copy of the foregoing petition for writ of error, and waive the deposit with the Clerk of the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas, of a true copy of said petition for writ of error, this the 29th day of January, A. D. 1919.

GEO. E. WALLACE,
W. L. BERKSHIRE,
Attorneys for W. S. Berkshire, Temporary Administrator and Personal Representative of the Estate of William A. Linden, Deceased, Defendant in Error.

Endorsed on back: App. No. 11076. In the Supreme Court of Texas. Southern Pacific Company, plaintiff in error, vs. W. S. Berkshire, Temporary Administrator and Personal Representative of the Estate of William A. Linder, deceased, defendant in error. Petition of Southern Pacific Company for writ of error. Refused March 12, 1919. Filed in Supreme Court Feby. 3, 1919. F. T. Connerly, Clk., by H. L. Clamp, Deputy.

Clerk's Office, Supreme Court.

I, F. T. Connerly, Clerk of the Supreme Court of the State of Texas, do hereby certify that the above and foregoing twenty-three (23) pages contain a true and correct copy of petition for writ of error in the case of App. No. 11076, Southern Pacific Co., plaintiff in error vs. W. S. Berkshire, Temp. Admr. and Personal Representative of Estate of Wm. A. Linder, deceased, Defendant in error, now on file in this office.

Witness my hand and the seal of the Supreme Court of Texas, at the City of Austin, this the 29th day of April, A. D. 1919.

[Seal Supreme Court of the State of Texas.]

F. T. CONNERLY,
Clerk Supreme Court.

111 App. No. 11076.

SOUTHERN PACIFIC CO.

vs.

W. S. BERKSHIRE, Admr.

(From El Paso Co., 8th District.)

March 12th, 1919.

This day came on to be heard the appln. of Southern Pac. Co. for a writ of error to the Court of Civil Appeals for the Eighth District and the same having been duly considered, it is ordered that the application be refused; that the applicant Southern Pacific Co. and sureties, C. R. Morehead and Geo. D. Flory pay all costs incurred herein.

Clerk's Office, Supreme Court.

I, F. T. Connerly, Clerk of the Supreme Court of the State of Texas, do hereby certify that the above is a true and correct copy of the order refusing application for writ of error in the case of App. No. 11076, Southern Pacific Co., Plaintiff in error vs. W. S. Berkshire, Admr., Defendant in Error, as entered in the Minutes of said Court on the 12th day of March, A. D. 1919.

Witness my hand and the seal of the Supreme Court of the State of Texas, at the City of Austin, this the 1st day of May, A. D. 1919.

[Seal Supreme Court of the State of Texas.]

F. T. CONNERLY,
Clerk Supreme Court.

112 *Stipulation by Counsel to said Cause Regarding the Issuance of the Mandate of the Court of Civil Appeals.*

Filed in said Court May 2, 1919. J. I. Driscoll, Clerk.

No. 891.

In the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas, at El Paso.

SOUTHERN PACIFIC COMPANY, Appellant,

vs.

W. S. BERKSHIRE, Temporary Administrator & Personal Representative of the Estate of W. A. Linder, Deceased, Appellee.

At the request of Beall, Kemp & Nagle, attorneys for Southern Pacific Company, appellant in the above case, and upon their announcing that petition for certiorari to the United States Supreme Court will be filed, I agree not to take out mandate in said cause until after said application for writ of certiorari shall be acted on by the United States Supreme Court or until the expiration of the time of filing such application if it be not filed within the time prescribed by law.

GEO. E. WALLACE,

Attorneys for Appellee, W. S. Berkshire, Temporary Administrator and Personal Representative of the Estate of W. A. Linder, Deceased.

113 *Cost Bill of Costs Incurred in the Supreme Court of Texas and in the Court of Civil Appeals.*

Filing record and facts	.50
Docketing cause	.50
Appearances	1.00
Filing briefs, opinion, papers	2.00
Filing and entering motion for rehearing	.35
Orders	2.00
Notices	5.50
Judgment	1.00
Taxing costs	.50
Certified Copy Bill of Costs	1.00
Certificate with Seal	.50
Mandate	1.50
Recording Opinion	9.00
Clerk's Costs Supreme Court of Texas	8.00
Entering orders made by the Supreme Court	.50
Transcript to the U. S. Supreme Court	46.80
Transcript on Application for Writ of Error (State Court)	.75
Express charges	.65
	$82.65

114 *Certificate of Transcript.*

I, J. I. Driscoll, Clerk of the Court of Civil Appeals of the Eighth Supreme Judicial District of the State of Texas, hereby certify the foregoing transcript of — pages constitutes a full, true and correct copy of the proceedings had and orders entered in the above entitled cause, as set forth therein, in the Supreme Court of the State of Texas, and in said Court of Civil Appeals of the State of Texas, as the same appear on file and of record in this office.

The foregoing constitutes the entire transcript in the cause.

Witness my hand and the official seal of said court, this the 8th day of May, A. D. 1919.

[Seal Court of Civil Appeals of the State of Texas.]

J. I. DRISCOLL, *Clerk.*

115 [Endorsed:] No. —. In Court of Civil Appeals, Eighth Supreme Judicial District of Texas, El Paso. Southern Pacific Company, Appellant, vs. W. S. Berkshire, Admr., Appellee. J. I. Driscoll, Clerk.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Court of Civil Appeals for the Eighth Supreme Judicial District of the State of Texas, Greeting:

Being informed that there is now pending before you a suit in which Southern Pacific Company is appellant, and W. S. Berkshire, Administrator and Personal Representative of the Estate of W. A. Linder, deceased, is respondent, which suit was removed into the said Circuit Court of Civil Appeals by virtue of an appeal from the District Court of the 41st Judicial District in and for El Paso County, State of Texas, we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Court of Civil Appeals and removed into the Supreme Court of the United States,—

Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the seventeenth day of June, in the year of our Lord one thousand nine hundred and nineteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 27120. Supreme Court of the United States. No. 1034. October Term, 1918. Southern Pacific Company vs. W. S. Berkshire, Temporary Administrator, etc. Writ of Certiorari.

In the Court of Civil Appeals of the Eighth Supreme Judicial District of the State of Texas.

No. 891.

SOUTHERN PACIFIC COMPANY, Appellant,

vs.

W. S. BERKSHIRE, Temporary Administrator and Personal Representative of the Estate of William A. Linder, Deceased, Appellee.

Stipulation for Certification of Record by the Clerk to the Supreme Court of the United States.

Whereas, heretofore the appellant above named applied as plaintiff in error to the Supreme Court of the United States for a Writ of Certiorari to bring up for review the final judgment of said Court of Civil Appeals for the Eighth Supreme Judicial District of the State of Texas in the above entitled cause;

And whereas, on the filing of and as a part of said application said appellant filed with the Clerk of the Supreme Court of the United

States a certified transcript of the entire record in the Court of Civil Appeals for the Eighth Supreme Judicial District of the State of Texas, and the proceedings held in the Supreme Court of the State of Texas, certified to by the Clerks of said Court of Civil Appeals for the Eighth Supreme Judicial District of the State of Texas, under the seal of said Circuit Court of Appeals for the Eighth Supreme Judicial District of the State of Texas and under the seal of said Suprem Court of the State of Texas, which said records constitute the entire transcript of record in the case in said Circuit Court of Appeals for the Eighth Supreme Judicial District of the State of Texas, and include all the proceedings in said Supreme Court of the State of Texas;

And whereas, thereafter said Supreme Court of the United States ordered and on the 17th day of June, 1919, there was issued over the hand of the Clerk of and under the seal of said Supreme Court of the United States a Writ of Certiorari directing the certification by said Court of Civil Appeals for the Eighth Supreme Judicial District of the State of Texas to said Supreme Court of the United States of the record and proceedings in said cause first hereinabove entitled;

And whereas, said cause now pending before said Supreme Court of the United States is entitled Southern Pacific Company, Petitioner, vs. W. S. Berkshire, Temporary Administrator and Personal Representative of the Estate of William A. Linder, Deceased, Respondent, and numbered in said Supreme Court of the United States No. 1034, October Term, 1918;

Now, therefore, it is hereby stipulated by the undersigned attorneys, respectively, for said plaintiff in error and said defendant in error in said Supreme Court of the United States: That said certified record of said Clerk of the Court of Civil Appeals for the Eighth Supreme Judicial District of the State of Texas, consisting of the entire record in said Court of Civil Appeals for the Eighth Supreme Judicial District of the State of Texas and the entire record of all proceedings held in the Supreme Court of the State of Texas, and so filed on said application by said Southern Pacific Company for a writ of certiorari may be taken as a return by said Court of the State of Texas, certified to by the Clerks of said Court of Civil Appeals for Civil Appeals for the Eighth Supreme Judicial District of the State of Texas and by the Clerk thereof and as a complete return to said Writ of Certiorari dated as aforesaid June 17, 1919, and that a certified copy of this stipulation may be sent up by said Clerk of the Court of Civil Appeals for the Eighth Supreme Judicial District of the State of Texas as a part of his return to said Writ of Certiorari.

Dated at El Paso, Texas, this 10th day of July, A. D. 1919.

(S'g'd) T. J. BEALL,
MAURY KEMP AND
M. NAGLE,
W. I. GILBERT,
Attorney- for Plaintiff in Error.

(S'g'd) GEO. E. WALLACE,
W. L. BERKSHIRE,
Attorney- for Defendant in Error.

STATE OF TEXAS,
County of El Paso, ss:

I, the undersigned, J. I. Driscoll, Clerk of the Court of Civil Appeals for the Eighth Supreme Judicial District of the State of Texas, do hereby certify that the foregoing is a full, true and correct copy of a stipulation filed with me in the cause first entitled as above and so filed on the 10th day of July, 1919, and that I am acquainted with the signatures of counsel who signed the said stipulation and verily believe that their signatures to the original stipulation so filed are their true and genuine signatures. That said counsel are each admitted to practice in this Court and that each of them was an attorney of record in the cause first entitled as above.

Witness my hand and the official seal of said Court this 10th day of July, 1919.

[Seal Court of Civil Appeals of the State of Texas.]

J. I. DRISCOLL,
Clerk of the Court of Civil Appeals for the Eighth Supreme Judicial District of the State of Texas.

[Endorsed:] No. 891. In the Court of Civil Appeals of the Eighth Supreme Judicial District of the State of Texas. Southern Pacific Company, Petitioner, vs. W. S. Berkshire, Temporary Administrator and Personal Representative of the Estate of William A. Linder, Deceased, Respondent. Stipulation for Certification of Record by the Clerk to the Supreme Court of the United States. W. L. Gilbert, Attorney for Appellant, 737-8 Title Insurance Bldg., Los Angeles, Calif.

In the Supreme Court of the United States, October Term, 1918.

No. 1034.

SOUTHERN PACIFIC COMPANY, Plaintiff in Error,

vs.

W. S. BERKSHIRE, Temporary Administrator and Personal Representative of the Estate of William A. Linder, Deceased, Respondent.

Return to Writ of Certiorari.

To the Honorable the Supreme Court of the United States of America and to Honorable Edward D. White, Chief Justice of the United States:

The Presiding Justice of the Court of Civil Appeals for the Eighth Supreme Judicial District of the State of Texas and the Associate

Justices of said Court to whom there is addressed a Writ of Certiorari issued out of the Supreme Court of the United States in the cause entitled as above and dated on the 17th day of June, 1919, hereby respectfully make return to said writ as follows:

All of the records and proceedings before said Court of Civil Appeals for the Eighth Supreme Judicial District of the State of Texas and before the Supreme Court of the State of Texas in the cause numbered 891 and entitled Southern Pacific Company, petitioner, vs. W. S. Berkshire, Temporary Administrator and Personal Representative of the Estate of William A. Linder, Deceased, respondent, are fully shown and set forth in a certified transcript of record filed with the Clerk of said Supreme Court of the United States by said plaintiff in error on its application entitled as above for a Writ of Certiorari, which said transcript of record was certified to under the hand of the Clerk of said Court of Civil Appeals for the Eighth Supreme Judicial District of the State of Texas and the seal of said Court on the 8th day of May, A. D. 1919.

Attached hereto and made a part hereof is a certified copy of the stipulation this day filed with the Clerk of the Court of Civil Appeals for the Eighth Supreme Judicial District of the State of Texas by the respective attorneys for said plaintiff in error and said defendants in error, that said certified copy of said record may be taken as a return to said writ, said certified copy of said stipulation being certified to by the Clerk of this Court.

There is also attached hereto and made a part hereof the Writ of Certiorari to which this return is made.

Witness James R. Harper, Presiding Justice of the Court of Civil Appeals for the Eighth Supreme Judicial District for the State of Texas, on the 10th day of July, A. D. 1919.

[Seal Court of Civil Appeals of the State of Texas.]

J. I. DRISCOLL,
Clerk of the Court of Civil Appeals for the Eighth Supreme Judicial District of the State of Texas.

[Endorsed:] 372—27120. No. 1034. In the Supreme Court of the United States. October Term, 1918. Southern Pacific Company, Plaintiff in Error, vs. W. S. Berkshire, Temporary Administrator and Personal Representative of the Estate of William A. Linder, Deceased, Respondent. Return to Writ of Certiorari. W. I. Gilbert, Attorney for Plaintiff in Error, 737-8 Title Insurance Building, Los Angeles, California.

[Endorsed:] File No. 27120 Supreme Court U. S. October Term, 1919. Term No. 372. Southern Pacific Co., Petitioner, vs. W. S. Berkshire, Temporary Admr., &c. Writ of Certiorari and Return. Filed July 23, 1919.

91

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1918.

Southern Pacific Company, a Corporation,

Petitioner and Plaintiff in Error,

vs.

W. S. Berkshire, Temporary Administrator and Personal Representative of the Estate of William A. Linder, Deceased,

Respondent and Defendant in Error.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Southern Pacific Company, respectfully prays for a writ of *certiorari* to review the decision of the Court of Civil Appeals for the 8th Supreme Judicial District of Texas, at El Paso, delivered on the 5th day of

December, 1918, affirming the judgment of the District Court of El Paso county, Texas, 41st Judicial District, dated December 10th, 1917, awarding fifteen thousand dollars damages, together with six per cent interest in accordance with verdict of the jury against said petitioner for injuries resulting in the death of said William A. Linder. In said case there was claimed by your petitioner a right, privilege and immunity under the Federal Employers' Liability Act of April 27th, 1908, chapter 149, 35 Stats. 65, which claim of right, privilege and immunity was denied by judgment of said court of Civil Appeals for the 8th Supreme Judicial District of Texas.

On September 18th, 1918, petitioner filed its petition for a rehearing by said Court of Civil Appeals of Texas, which was denied by that court on the 2nd day of January, 1919. Thereupon, and within due time, petitioner filed its petition with the Supreme Court of Texas asking for a writ of error to review said judgment of the Court of Civil Appeals of Texas, which petition was denied by the Supreme Court of Texas on the 12th day of March, 1919.

This application is made under the provision of section 237 of the Judicial Code, as amended September 6, 1916, chapter 448, 39 Stats. 726.

STATEMENT OF THE CASE.

Respondent, as plaintiff in the court below, brought suit as temporary administrator and personal representative of the Estate of William A. Linder, deceased, against petitioner, defendant in the court below, for the use and benefit of the surviving wife and children of the said William A. Linder, deceased. Plaintiff alleged that on July 3rd, 1916, the deceased, William A. Linder, was employed by defendant company, as locomotive engineer running between El Paso, Texas, and Lordsburg, New Mexico, and that while running and operating an engine attached to one of defendant company's trains between said points at Carney, New Mexico, deceased was struck by a mail crane and was so injured that he died shortly thereafter.

Plaintiff alleged that the defendant was guilty of negligence by placing and maintaining a mail crane or such portion or part of the same in such close proximity to track and engine as to strike the deceased while occupying his customary place on the engine.

There were also further allegations of negligence, all of which plaintiff alleged were the proximate cause of the accident which resulted in the death of William A. Linder. [Tr. 1-9.]

Defendant answered by a general demurrer and general denial, by plea that decedent met

his death while in the employ of defendant company and while engaged in interstate commerce and answered that Linder's death was due to risks and dangers assumed by him for which defendant was not liable. [Tr. pp. 9 and 10.]

On trial before a jury, the verdict was rendered in favor of plaintiff for fifteen thousand dollars apportioned to the surviving wife and children. [Tr. p. 16.]

The defendant's motion for a new trial was denied on the 4th day of January, 1918 [Tr. pp. 33 and 34], to which action of the court defendant excepted and appealed to the Court of Civil Appeals for the 8th Supreme Judicial District at El Paso, which appeal was based upon the assignments of error found on pages 27 to 33 of transcript.

The record shows that at the time of the accident resulting in the death of William A. Linder, he was in the employ of defendant company and engaged in operating a train and engine then engaged in interstate commerce. This fact was agreed to by counsel for plaintiff and defendant (S. F. 18), consequently the case was covered by Employers' Liability Act. Undisputed evidence in the case showed that Linder had made ninety-nine (99) trips over defendant company's line from El Paso to Deming, New Mexico, by the station of Car-

ney, New Mexico, where the mail crane is located from July 1st, 1914, to December 21st, 1914, and had made one hundred and fifty-four (154) trips over said company's line past the point of the accident, during the six months immediately preceding his accident on July 3, 1916, and during all of this time the said mail crane was in the same position and similarly located as it was at the time of the accident to said deceased Linder. The undisputed evidence also shows that said trips were made by Linder on both freight and passenger trains, some of which passenger trains took up the mail at Carney, New Mexico, and that there were at least six mail trains similar to the one in question and similarly situated on defendant's lines. The mail crane at Carney was erected in conformance with postoffice regulations and subject to the specifications of postal department. (S. F. 9 to 12.)

All cranes are at a standard distance from the side of the car, that is, they are all the same distance exactly and the same hook that would take a sack off a train in Arizona or New Mexico would take it off as it goes through Western Kansas. (S. F. 7 to 8.)

The undisputed evidence also shows that the mail crane at Carney, New Mexico, could be seen one-half a mile down the track by the engineer when traveling in the direction in

which deceased was traveling at the time of the accident to him, and that deceased was struck by said mail crane while passing it. Nobody witnessed the accident, which occurred shortly after 9 o'clock a. m., July 3rd, 1916. Linder was found after passing Carney Station in his seat with his arm and head out of the car. (S. F. 4-5.)

Such being the undisputed evidence in the case, defendant excepted to the judge's charge to the jury submitting any issue of negligence, because there was no negligence on the part of defendant proximately causing any injury to deceased Linder which resulted in his death, and further objected to the charge because the evidence showed that the injuries received by Linder were directly and proximately caused by his own negligence.

Defendant also objected and excepted to the charge because it submitted the issue of assumed risk to the jury when the undisputed evidence showed that any injuries which the deceased received were the result of risks assumed by him and there was no issue of fact to submit to the jury and no issue of assumed risk should have been submitted to the jury on the undisputed facts of the case.

Said exceptions were overruled by the court. [Tr. 18 to 21.] Defendant asked for special charge instructing the jury to return a verdict

in favor of Southern Pacific Company, which was refused by the court. [Tr. 23 to 24.]

The judgment of the Court of Civil Appeals of Texas upheld the action of the trial court in refusing defendant's application for instructed verdict, and also upheld the action of the court in submitting the question of assumed risk to the jury.

By this judgment of the Court of Civil Appeals of Texas affirming the action of the District Court of El Paso, Texas, and holding that there was evidence of defendant's negligence to be submitted to the jury, and also that the question of assumption of risk should be submitted to the jury when the undisputed evidence of the case showed that the injury which resulted in Linder's death was not caused by any negligence on the part of defendant and that Linder had assumed the risks of his employment, being engaged in interstate commerce, deprived your petitioner of a right, privilege and immunity under the Federal Employers' Liability Act of April 27th, 1908.

On the record in this case defendant was clearly entitled to a directed verdict on the ground that plaintiff had not proved that Linder's death was caused by any negligence of the defendant, and also on the ground that Linder had assumed the risks of his employment. It has been held by this court that

such questions are federal questions and may be reviewed by this court.

Chicago, Rock Island & Pacific Ry. Co. v. Devine, 239 U. S. 52;

Seaboard Airline v. Padgett, 236 U. S. 668;

New York Central & Hudson R. R. Co. v. Tonsellito, 244 U. S. 360.

Your petitioner presents herewith, as part of its petition, a brief, showing more fully its views upon the question involved and a certified copy of the entire transcript of record in the case, including proceedings in the Court of Civil Appeals for the 8th Supreme Judicial District of Texas, and the proceedings in the Supreme Court of Texas.

Wherefore, your petitioner prays that in order that it may effectively assert and rely upon a right, privilege and immunity claimed by it under a statute of the United States, to-wit: Federal Employers' Liability Act of April 27, 1908, a writ of *certiorari* be issued out of and under the seal of this court, directed to the judges of the Court of Civil Appeals of the 8th Supreme Judicial District of Texas at El Paso, requiring them to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the records of the proceedings of said Court of

Civil Appeals of Texas in the above entitled matter, to the end that judgment of said Court of Civil Appeals of Texas may be reviewed, as provided by law, and that this Honorable Court may thereupon proceed to correct the errors complained of and reverse said judgment and remand said cause and grant to your petitioner such other and further relief in the premises as the nature of the case may require and in conformity with the law.

And your petitioner will ever pray, etc.

SOUTHERN PACIFIC COMPANY,
Petitioner and Plaintiff in Error.
By PAUL SHOUP,
Vice-President.
W. I. GILBERT,
Attorney for Said Petitioner.

WM. F. HERRIN,
GUY V. SHOUP,
HENRY H. GOGARTY,
Of Counsel.

State of California, County of Los Angeles—ss.

W. I. Gilbert, being first duly sworn, deposes and says:

I am an attorney and counsellor of the Supreme Court of the United States; I am the attorney for Southern Pacific Company, petitioner named in the foregoing petition for a writ of *certiorari;* the allegations of said petition are true as I verily believe; the points raised therein are, in my opinion, meritorious, and said petition is not filed for the purpose of delay.

W. I. GILBERT,

(Seal) Subscribed and sworn to before me this 2nd day of May, 1919.

HOWARD PROWSE,

Notary Public in and for the County of Los Angeles, State of California.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1918.

Southern Pacific Company, a Corporation,

Petitioner and Plaintiff in Error,

vs.

W. S. Berkshire, Temporary Administrator and Personal Representative of the Estate of William A. Linder, Deceased,

Respondent and Defendant in Error.

Brief in Support of Petition for Writ of Certiorari.

In its charge to the jury the court submitted (1) the question of petitioner's negligence and (2) the question of assumption of risk by Linder [Tr. 13-14].

Your petitioner insists that the case should not have been allowed to go to the jury on either ground in view of the fact that the record

clearly shows that the injuries suffered by Linder were not caused by the negligence of the defendant company but were solely due to his own negligence, and also because it was shown without contradiction, that Linder's death was due to risks and dangers assumed by him, risks which he knew of because they were obvious and he had had an opportunity to observe them, and there was no issue of fact on this question to be submitted to a jury.

This action of the trial court and the decision of the Texas Court of Civil Appeals, affirming the judgment of the trial court deprived your petitioner of a right claimed by it under the Federal Employer's Liability Act of April 27, 1908.

The denial of this right raised a Federal question which can be reviewed by this court.

The case of Sea Board Air Line v. Padgett, 236 U. S. 668, was a suit to recover damages for the death of a railroad engineer and was brought under the Employer's Liability Act. There were nine assignments of error, two dealing with the question of the jury being misled concerning the doctrine of assumption of risk. Having disposed of these two assignments the court said at page 673, "While this disposes of the two assignments which are directly and specifically concerned with the interpretation of

the statute, nevertheless the remaining seven also raise questions of law under the statute, since they all in one form or another rest upon the contention that error was committed by the trial court in not taking the case from the jury and instructing a verdict for the defendant upon the assumption that there was no evidence sufficient to justify the submission of the case to the jury for its consideration. Creswell v. Knights of Pythias, 225 U. S. 246, 261; Southern Pacific Co. v. Schuyler, 227 U. S. 601, 611; St. Louis & Iron Mountain Ry. v. McWhirter, 229 U. S. 276, 277; Miedrich v. Lauenstein, 232 U. S. 236, 243, 244; Carlson v. Curtiss, 234 U. S. 103, 106. Considering the case from this point of view we think the contention cannot be said to be frivolous since its solution is by no means free from difficulty, a situation which was manifested by the division of opinion which arose on the subject in the court below and by the further fact that some members of this court now consider the proposition as affording adequate ground for reversal."

But the court held in that case that there was sufficient evidence to submit the case to the jury, but we respectfully submit that on examination of the record of the case at bar, it will be found that there was not sufficient evidence on the question of defendant's negligence or on the question of assumption of risk

to justify the submitting of the case to the jury on these points and the action of the trial court in submitting these questions to the jury is reversible error.

In Chicago, Rock Island & Pacific v. Devine, 239 U. S. 52, which was also a suit for recovery under the Employer's Liability Act, the court said:

> "Two propositions are relied upon for reversal; first, a refusal to instruct a verdict on the ground that there was no evidence tending to show either negligence or that the company or the deceased at the time of the particular transaction from which the injury arose was engaged in interstate commerce, and second, a further refusal to instruct that a state statute limiting the amount of recovery was controlling although the suit was under the Act of Congress. These contentions are Federal (Seaboard Air Line v. Padgett, 236 U. S. 668, 673; Central Vermont Ry. v. White, 238 U. S. 507, 509) and there is jurisdiction, as we do not find them wholly frivolous."

See also

New York Central & Hudson Railroad v. Tonsellito, 244 U. S. 360.

From the foregoing cases it clearly appears that the error of trial court in leaving the issue of negligence and assumption of risk to the jury and the action of the Court of Civil Appeals

of Texas in affirming the judgment of the trial court, raises a Federal question, because the erroneous actions of the courts of Texas denied defendant the right of being shielded from responsibility under the statute, for if the statute had been properly applied no liability on its part from the statute would result.

FACTS OF THE CASE.

It was pleaded by plaintiff and urged strongly that the defendant had been negligent in placing the mail crane too near the tracks, but it was positively shown without contradiction that this crane at Carney was situated similarly to all the other mail cranes on defendant's line.

One of defendant's witnesses, G. A. Thumb, an employee of defendant who had been running over its line from El Paso west and on the Tucson division since 1888, testified without contradiction that there were between El Paso or the Rio Grande and Deming, New Mexico, seven mail cranes. This witness testified that he was familiar with the cranes along there in July, 1916, the month in which the accident befell Linder; that he saw no difference in the crane at Carney from the others; that it was not too close; that he passed by the crane at 12:00 o'clock on the night of the day on which the accident befell Linder; that he had seen an account of the accident to

Linder [illegible] he newspaper and naturally took notice of the crane and its position; that the crane was not too close and that it was situated similarly to all the other cranes between El Paso or the Rio Grande and Deming, New Mexico. The witness further testified that the mail crane at Carney, New Mexico, could be seen one-half a mile down the track and that traveling [illegible]est, the direction in which Linder was traveling at the time of the accident the mail crane could be seen for half a mile. [S. F. pp. 13-14.]

It was also shown without contradiction that the accident occurred in broad daylight after 9 a. m. and that the track at Carney is straight for twenty miles and the mail crane is plainly visible to [illegible] engineer many hundreds of feet traveling west from El Paso to Deming and by the sta[illegible]n of Carney.

The wi[illegible]ess Haley who testified as to the number of trips deceased Linder had made during the year 1916, showed that part of his trips were made on passenger trains and part on freight trains and that Linder had operated passenger trains #1 and #2 as locomotive engineer; and that passenger train #1 going west and #2 going east took up the mail at Carney. [S. F. pp. 9-11.]

Linder being at the time of his death employed in interstate commerce the Federal Em-

ployer's Liability Act applied and consequently Linder assumed all the risks and dangers incident to his employment and the injury which he received and which resulted in his death was the result of such risk.

The facts of the case of Kenney v. Meddaugh, 118 Fed. 209, which case was cited in defendant's brief in the Court of Appeals, are almost identical with the facts in the case involved. In the Kenney case it was shown that decedent had been in the employ of defendant as a fireman for not quite a year before the accident; in that time he had worked on both divisions of defendant's road, but most of the time on the eastern division from Battle Creek to Fort Huron. He had made in all 206 trips, of these 123 were made on the eastern division and 83 on western. He had worked on both freight and passenger trains. The accident which resulted in decedent's death happened after dark at Climax, a station on the eastern division of defendant's railroad extending from Battle Creek, Michigan, to Chicago, Illinois. At about 475 feet east of Climax a mail crane was stationed to hold mail pouches to be taken aboard fast passenger trains when stopping at that point by means of mail catchers attached to mail cars. As decedent's train passed this mail crane on the fateful evening, he was struck in

the forehead by the upper hook of the crane and rendered unconscious and shortly thereafter died. No one saw the collision and it was only a matter of inference from the circumstances that his death was due to this cause, but there was no doubt that it was so. It was shown that in addition to the night in question being dark it was snowing, though to no great extent, and blowing hard.

In this case and on this state of facts the court held that a locomotive fireman will be held to have assumed the risk from the proximity to the track of the mail crane, he having been a fireman on the engine and having passed this place eighty-three times and having been over the other division one hundred and twenty-three times, and the crane having been in position all that time at substantially the same distance from the track as the other cranes on both divisions, and this, though it was dark and blowing hard and snowing, these circumstances merely requiring extra caution on his part.

The court further held that the railroad company could not be held to have failed to have used due care, which would provide a locomotive fireman a reasonably safe place to work, by reason of the fact that the mail crane, when in position, was at its nearest point nearly 13½ inches from the side of the locomotive, this being the distance of other cranes on this and other roads.

In this case the lower court had granted defendant preemptory instructions on the ground that as a matter of law the defendants had not been guilty of negligence; that decedent had assumed the risk of the proximity of the mail crane to the track and that, if defendants had been guilty of negligence, decedent had likewise been guilty of contributory negligence. The Circuit Court of Appeals for the Sixth Circuit affirmed this action of the lower court.

It is respectfully submitted that the law as laid down in the case of Kenney v. Meddaugh, *supra*, is correct, and should have been applied to the facts in the present case.

The case of Missouri Pacific Railway v. Somers, 9 Southwestern 741, is also very much in point. Here a brakeman in attempting to let off a defective brake was struck by a cattle guard, which like all the guards along the road was near the track. The court held that although the brakeman did not know of the proximity to the track of the one in question he could not recover as he was held to have assumed all the risks incident to his employment.

It is submitted that the law, as laid down in the Somers case is applicable to this case.

The case mainly relied upon by the Court of Civil Appeals of Texas in its opinion was the case in the Supreme Court of Texas, M. K.

& T. Ry. v. Williams, 103 Texas 228, which was a mail crane case, but there were elements in that case which were not present in the Linder case. The negligence alleged in the Williams case was first, locating the crane too near the track and, second, in allowing the ties of the track near it to be in such rotten condition as to allow an engine to rock and sway so as to cause a collision. The charge of the court submitted both issues made by the pleadings to the jury.

It was found in the opinion of the Court of Appeals that after the mail sack was hung it left only 13¾ inches space between the ends of the iron clasps and the side of the engine. The Court of Appeals found, as a matter of fact that the natural swing of the engine on its springs when the track was in good repair, was 4 inches, which when taken from the 13¾ inches left 9¾ inches as a clearance when the track was in good repair. The Court of Appeals further decided that it was a fact that an examination of the ties immediately after the accident showed that they were rotten and that one of the ties had a broken piece 3 inches square and 18 inches long and that right near the mail crane there was another very rotten tie.

There was also evidence that the engine which Williams operated at the time weighed 140 tons and there was evidence that an engine of this weight would roll and sway on its springs when

operated over the track so that the cab of the engine would have extended out 12 inches closer to the crane than at the time it was perpendicular.

The court held that this testimony was uncontradicted and therefore the cab was brought so as to almost or nearly come into collision with the extended arm of the mail crane, and this was shown by actual measurement. The court also held that the evidence raised an issue for the jury to say whether the condition of the track constituted negligence. When the case reached the Supreme Court of Texas that court was bound by the findings of fact and we submit, correctly held on those facts that the proximity of the crane in view of the condition of the track and roadbed which caused the engine to sway and swing was negligence on the part of the railroad. It will be noticed, however, that the law of assumed risk was not discussed in this case for the reason that the record did not show that at the time the deceased Williams was killed he was operating the train in interstate commerce, nor did the record show that assumed risk was pleaded.

The facts in the Williams case are so different from the facts and circumstances under which Linder met his death that it is respectfully submitted that the decision of the Williams case has no bearing on the present case.

The Court of Civil Appeals cited in its judgment the case of Gila Valley, G. H. & N. Ry. Co. v. Hall, 232 U. S. 101, stating that in their opinion this case presented a clear statement of the doctrine of assumed risk, and cited in part as follows:

> "Moreover, in order to charge an employee with the assumption of a risk attributable to a defect due to employer's negligence, it must appear not only that he knew (or is presumed to have known) of the defect, but that he knew that it endangered his safety, or else such danger must have been so observable that an ordinary prudent person under the circumstances would have appreciated it."

The law as laid down in this case is unquestionably correct, having regard to set of circumstances with which the court was dealing, which were not similar to the facts in the Linder case.

Under the law laid down in the above cited case an employe must know or be presumed to have known the defect and also to have known that it endangered his safety or the danger must be such that an ordinary prudent person would have appreciated.

There can be no question from the facts in the Linder case, it having been shown without contradiction that Linder had passed this point at Carney a great number of times and had passed it in trains which took up the mail from

the mail crane; that he must have known of the proximity of the mail crane to the track and he must have appreciated such danger as there was in passing this point.

The law as laid down by the case of Jacobs v. Southern Railway Company, 241 U. S. 229, in our opinion applies to the present case. In that case it was held that an experienced employee admittedly knowing the material conditions and the presence of a pile of cinders who attempts to board a moving engine with a vessel of water in his hand must be considered as appreciating the danger and assuming the risk, although at the time he may have forgotten the existence of the cinders, and this is so even if the employer was negligent in allowing the cinders to remain.

In this case the court affirmed its ruling in the case of Seaboard Air Line v. Horton, 223 U. S. 492, to the effect that there being no violation of any safety statute, the common law defense of assumption of risk is not eliminated in such case by the Employer's Liability Act.

In the present case it was not even contended that there had been any violation of any safety statute.

We also respectfully call the court's attention to the cases of Boldt v. Pennsylvania R. R.,

245 U. S. 441, and Baugham v. New York, Philadelphia & Norfolk R. R., 241 U. S. 237. In conclusion we respectfully urge upon the court that the decision of the Circuit Court of Appeals for the Sixth Circuit, in the case of Kenney v. Meddaugh, 118 Federal 209, correctly states the law as applied to the facts in the present case and should be approved by this court.

It is respectfully submitted that the Court of Civil Appeals of Texas erred in affirming the judgment of the District Court of Texas for the Forty-first Judicial District and that by doing so it deprived your petitioner of a right, privilege and immunity claimed by it under a statute of the United States, to-wit: Federal Employer's Liability Act, April 27, 1908.

We therefore respectfully request that *certiorari* be issued herein and that thereupon and on the coming up of the certified record, judgment of the Court of Civil Appeals of Texas be reversed by this court.

Respectfully submitted,

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No. [redacted]106

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1919.

SOUTHERN PACIFIC COMPANY, a corporation, Petitioner and Plaintiff in Error,

vs.

W. S. BERKSHIRE, Temporary Administrator and Personal Representative of the Estate of William A. Linder, Deceased, Respondent and Defendant in Error.

RESPONDENT'S BRIEF ON CERTIORARI TO THE COURT OF CIVIL APPEALS OF TEXAS

C. B. HUDSPETH,
GEO. E. WALLACE,
A. J. HARPER,
Attorneys for Respondents

No. 372.

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BRIEF FOR DEFENDANT IN ERROR.

ABSTRACT OF THE CASE.

Defendant in error adopts statement of the case as set out by plaintiff in error and says that the same is substantially correct.

COUNTER ASSIGNMENTS OF ERROR.

Petitioner was not deprived of an asserted Federal right because:

(1) The Court, under the evidence, properly submitted the question of negligence to the jury, and

(2) There being no proof that the deceased knew of the close proximity of the end of the mail crane to the track, and the danger incident thereto, the question of whether or not the accident was due to risk assumed by him was properly submitted by the trial court to the jury.

STATEMENT OF FACTS.

At the time of the accident, the deceased, William A. Linder, was engaged in operating what is known as a soldier's train between El Paso and Deming. That when his train arrived at a distance of about forty-five miles from El Paso, it was discovered that the driving pin on the engine was running hot, and that after leaving the station at Myndus, about ten miles from the place of the accident, the deceased got out on the running board of his engine to make an examination, and that while approaching Carney he reentered the cab and took his seat on the engineer's seat box and while occupying that position, and looking out of the window, his head came in contact with the end of a mail crane to which was attached a mail sack, and he was so badly injured as to cause his death thereafter. It is shown that the end of the mail crane extended within a distance of between ten and fourteen inches of the side of the cab, while the mail crane was in use holding a mail sack, and we submit that the evidence is sufficient to justify the presumption that when the deceased was approaching the point of the accident, as well as the time of the accident, his attention was directed to the driving pin on his engine, and was therefore in the line of his duty while watching for this hot pin. At the time of the accident, the train was running at about thirty-five miles an hour. There was no other obstruction near the track, and while no one actually saw the accident, Mr. Anderson, the brakeman, who was standing in the gangway between the engine and tender, with his head extending out from ten to fourteen inches, was struck on the head by this end of the mail crane, or the mail pouch, and immediately looked up and saw Mr. Linder sitting in his seat box and on immediate investigation found him injured. That at the time the brakeman was struck by this mail crane, or mail pouch, blood from Mr. Linder's injuries was thrown on the brakeman and he immediately looked up. Deceased was sitting on the seat

box with his head leaning out of the window. (Tr. pp. 33 and 34.)

Mr. Taylor, the fireman on the engine, testified that while approaching the place of the accident, the deceased went out out on the running board and then returned and took his seat on the seat box, and immediately after the accident his attention was called to the deceased, and he was sitting on his seat unconscious. (Tr. 44.)

The mail crane is constructed by the use of a long upright post placed in the ground about four feet from the track to which is attached two arms, which extend out from the post about two and one-half feet when used to attach the mail bag, but when no mail bag is attached one of the arms flies up and the other down perpendicular or against the mail crane or post, and it is only when a mail sack is hung up that the arms extend towards the track. (Tr. p. 40.)

Plaintiff in error, on page 5 of its brief, attempts to construe the evidence with reference to the number of trips deceased made over this track erroneously, as far as mail trains are concerned. Mr. Haley, one of the defendant's employes, being recalled, stated that he had examined the records and found that deceased, during the past two years, had only made twelve trips on passenger trains and only three of these trips were on a train which would pick up mail at Carney, all the remainder of the trips being made on freight trains. (Tr. Top p. 45.)

It was shown by Mr. Nealy, an experienced railway mail clerk, that the railroad car has a hook on the door which extends out twenty-nine inches from the side of the car. That all passenger coaches are flush with the side of the cab of the engine. That the mail pouch could be caught successfully by placing it on the end of the arms of the mail crane at a distance of twenty-nine inches from the side of the coach, or the side of the engine.

There was no evidence introduced by the defendant showing or tending to show that the mail crane could not be suc-

cessfully operated by placing it at a greater distance from the car and track than this was placed. Neither was there any evidence introduced by the plaintiff in error to show the exact distance this crane and other cranes between El Paso and Deming were located, and operated from the track, and neither was there any evidence introduced to show positively that the other cranes were not at a greater distance from the track than this was. That is, no measurements were introduced by any witness, some of the witnesses testifying that they all had the appearance of being the same distance from the track. Under the Government regulations the company was required to either set the cranes and maintain them, or stop the trains and pick up the mail, but there is no proof of any Government regulation as to the distance at which the cranes shall be operated from the track. The postal laws do not permit mail sacks to be hung out for any other than mail trains, or trains that take up mail from the mail crane, and then the mail pouch must not be hung for more than ten minutes prior to the arrival of the train, whether it is on time or late. (Tr. p. 42.)

ARGUMENT.

We think that under the above evidence it was the duty of the trial court to submit to the jury the question of fact of whether or not the plaintiff in error was guilty of negligence in maintaining the mail crane within a distance of ten to fourteen inches from the side of the cab of the engine, and also whether or not the deceased assumed the risk. Plaintiff in error has no exception in the record to the charge as a whole, and as the question of fact was passed upon by a jury, and thereafter by the Court of Civil Appeals of the State of Texas, and by the Supreme Court of the State of Texas, in refusing writ of error, this finding, we submit, should not be disturbed by this Honorable Court. This exact question was before the Court in Southern Ry. v. Puckett, 244 U. S., 571, and in passing on this question Justice Pitney said:

"The Federal Supreme Court will not disturb the concurrent conclusion of two state courts in an action under the employers liability act of April 22, 1908, as amended by the Act of April 5, 1910, that there was sufficient grounds for attributing negligence to the railway carrier because of the presence of large clinkers in the track along which an employe was called upon to pass in the course of his duties, and over which he stumbled while carrying some blocks to be used in jacking up a wrecked car." (See also B. & O. Ry. Co. v. Whitacre, 242 U. S., 169; Seaboard Airline Ry. Co. v. Loric, 243 U. S., 572.)

Under the above authorities we submit that an appellate court would not be authorized to disturb the verdict of the jury and the decision of the Court of Civil Appeals and the Supreme Court of Texas, as the evidence clearly justified the jury in finding that the plaintiff in error was guilty of negligence in not placing the mail crane at a distance of at least twenty-five inches from the track where it could have been as efficiently operated as at a closer distance, and as there is no proof that deceased knew of the close proximity of this mail crane, together with the fact that his train did not carry mail, and for this reason he could presume that the mail sack would not be hung out, together with the fact that his mind was engrossed on his duties in operating the engine and watching for the hot pin, the jury was properly authorized to find that he did not assume the risk. In the case of Washington Ry. Co. v. Scala, 244 U. S., 630, this direct question was passed on by the Honorable Court, speaking through Justice Clark, and in passing on that question the Court said:

"And it is sufficient to say that the trial and appellant courts both found that the maintaining of such a pole so close to the track that a conductor could not safely discharge the duties required of him, constituted evidence of negligence sufficient to justify submitting the case to the jury, and with this conclusion we cordially agree."

Justice Walthall, in affirming this case, Rec. p. 48 (270 S. W., 326), found under the evidence that the company was guilty of negligence in maintaining the ends of this mail crane in such close proximity to the track as to endanger the lives of defendant's engineers and in passing upon the finding of the jury on the question of negligence, he said:

"We think it sufficiently appears from the facts shown that Linder's injury was caused by his coming in contact with the arm of the mail crane, and that at the time of his injury he was then at his place on the cab of his engine, looking out of the side or storm window and in the direction of the driving pin on the engine; his head extending at least 14 inches beyond the side of the cab. The jury could well conclude from the evidence that the arm of the mail crane or the mail pouch that struck the brakeman's hat struck Linder. The jury could also conclude from the evidence that the point of the arm of the crane extended to within 14 inches of the side of the cab. The mail pouch could be reached and taken by the hook, the other portion of the device, at any distance between 25 and 29 inches. The erection of the crane was shown to be for the convenience of the appellant. We think the jury could well conclude that all that was essential to a proper use of the mail device was that the mail pouch, when placed on the arm of the crane, should be at such a distance from the passing train that the end of the hook or catcher bar would extend beyond it, and, from the evidence of the witness Neeley, the railway mail agent on that division of the road, it is established that the device could so be placed and used and the mail pouch taken at a distance of 29 inches from the side of the train. The evidence shows that the side of the engine is flush with the side of the coaches. We have reached the conclusion that the evidence was sufficient on the issue of negligence to take the case to the jury." M., K. & T. Ry. Co. v. Williams, 103 Tex., 228.

The case of M., K. & T. Ry. Co. v. Williams, supra, was

where an engineer was killed while sitting in his cab, by coming in contact with the end of a mail crane. In that case, as in the case at bar, it is shown by the evidence that the mail crane was erected by the defendant for its own convenience. It was also shown by the evidence, as in the case at bar, that all that was necessary to the proper operation of the mail crane was that the mail sack should be so near the passing train that the end of the catcher bar would extend beyond it, and in affirming the finding of the lower court in holding the railroad company liable, the Court, speaking through Justice Williams, said:

"The occurrence itself is sufficiently indicative of negligence on defendant's part to call for an explanation from it, freeing it from such an imputation. The killing of one of its employes, while in the proper performance of his duty, by contact with a structure of its own contrivance near the track, strongly indicates a lack of proper care and foresight in the location of the structure, in view of the reasonable presumption that it could have been made consistent with the safety of employes while rendering the ordinary service."

We submit that where it is shown by evidence that the mail crane could be placed in such a position with the end of the arms 10 to 14 inches farther away from the side of the cab, than this mail crane was maintained, that this is sufficient to go to the jury as to whether or not the defendant was guilty of negligence in placing the mail crane in dangerous proximity to the track where it could have been placed at a greater distance without losing any of the efficiency of the mechanical appliances. That while the defendant contended that this mail crane was placed in a similar position to other mail cranes, this within itself is not sufficient to exonerate the defendant. As was well said by the Circuit Court of Appeals in the case of Virginia Railway Co. v. Halsted, 258 Fed., 425,

"Proof that the construction of a switch was in accordance with the custon of railroads is evidence of due care but not

conclusive; and the courts can not, as a matter of law, hold that the same is reasonably safe."

It was contended by the plaintiff in error in the trial court and in the Court of Appeals and it is its contention here, that the deceased assumed the risk. In the absence of positive proof it can be presumed that the deceased, at the time of the happening of the accident, was in exercise of due care for his own safety. B. & O. Ry. Co. v. Dandrigan, 191 U. S., 461; T. & P. Ry. Co. v. Gentery, 163 U. S., 353.

The burden of proof on this question was on the defendant and we submit that before deceased could be charged with having assumed the risk it was necessary for the defendant to show that he knew of the close proximity of the ends of the mail crane and the danger incident to its use in that position from passing engines. The only proof on this question was that deceased had been operating an engine over the road through this station, but according to the records introduced by the defendant, during the two years past he had only made twelve trips on passenger trains, and on only three of these trips had mail been taken up at Carney, all the other trips being on freight or passenger trains, which did not take up the mail from the mail crane (Tr. p. 45). This mail crane was not a contrivance which the deceased was required to use, and it was not shown that he could have ascertained the distance the mail crane was from the track, or the ends of the mail crane, when operating his engine three times by the mail crane, and before deceased as a matter of law would be charged with having assumed the risk, it was necessary to show by evidence, that he not only knew that the mail crane was too close to the track, but the proof must further show that at and immediately prior to the happening of the accident, he realized the danger of the close proximity of this mail crane to the track and the danger incident to operating his engine by the mail crane. We submit that the proof is positive that deceased, at and immediately prior to the happening of the accident,

was engrossed with his duty of looking at the driving pin, and had no opportunity of seeing the mail crane or the danger incident to the position he occupied in his cab at the time of the happening of the accident and this, within itself, under the authorities of this Honorable Court, would justify the jury in finding that deceased did not assume the risk.

Justice Walthall, in passing on this question, held that there was no evidence to show, as a matter of law, that the deceased assumed this risk, basing his conclusion of law on the decisions of the Supreme Court of Texas, and of this Honorable Court.

In the case of Choctaw O. & G. R. Co. vs. McDade, 191 U. S., 64-69, McDade, while riding on a moving train was struck by a water tank and knocked from the train and killed. The question of assumption of risk on the ground that deceased had been by this place a number of times and knew of the position and location of the water tank, was one of the main contentions of the case, and the appellant contended that he assumed the risk. The Supreme Court in passing on the question of assumed risk said:

"The question of assumption of risk is an act apart from that of contributory negligence. The servant has the right to assume that the master has used due diligence to provide suitable appliances in the operation of his business, and he does not assume the risk of the employer's negligence in performing such duties. The employee is not obliged to pass judgment upon the employer's method of transacting his business, but may assume that reasonable care will be used in furnishing the appliances necessary for its operation. This rule is subject to the exception that where a defect is known to the employee he cannot continue to use the defective apparatus in the face of knowledge and without objection, without assuming the hazard incident to such a situation. In other words, if he knows of a defect, or it is so plainly observable that he may be presumed to know of it, and continues in the master's employ without objection, he is taken

to have made his election to continue in the employ of the master. The charge of the court upon the assumption of risk was more favorable to the plaintiff in error than the law required, as it exonerated the railroad company from fault if, in the exercise of ordinary care, McDade might have discovered the danger. Upon this question the true test is not in the exercise of care to discover dangers, but whether the defect is known or plainly observable by the employee."

The case of Kanawaha & Mich. Ry. Co. vs. Kerse, Admx., 239 U. S., 576-582, was a suit brought by administrator for the negligent killing of Berry, an experienced yard brakeman employed by the railroad company in the Charleston yards. The alleged ground of negligence was that deceased while riding on the top of a car was struck by a piece of timber permanently maintained horizontally across one of the switch tracks three feet and four and one-half inches above the top of the box car. The evidence showed that deceased had been working in the yards for some length of time, and one switchman and foreman testified that they had warned Berry of the presence of this timber and that Berry had passed under it a number of times and that he knew of the location of this obstruction. It was strongly contended under this evidence that the trial court should have instructed a verdict for the defendant. The Supreme Court said:

"The burden of proof of the assumption of risk was upon the defendant, and unless the evidence tending to show it was clear and from unimpeached witnesses and free from contradiction, a trial court could not be charged with error in refusing to take the question from the jury."

We submit that the above case on the question of knowledge, or the opportunity of knowledge, of the danger is so much stronger than the case at bar, as there is no evidence of record in the case at bar to show that deceased knew of the close proximity of the end of the mail crane to the track, or knew that the mail sack was hanging up, and for this reason did not and could not appreciate the danger which is ab-

solutely necessary under the federal decisions before a person can be charged wtih assumption of rick.

The case of T. & P. Ry. Co. v. Swearingen, 196 U. S., 51, was a case where plaintiff was struck by a scale box maintained so close to the track as to render the switching operation extra hazardous. In that case plaintiff testified as follows:

"I knew we had to pass the scale box at the time I was hurt, but I was not thinking about it and did not see it when we passed it going in after these cars. There was nothing to hide the scale box from my view. It was perfectly open and apparent. I knew the location of the scale box before I was hurt."

In affirming the action of the trial court the Supreme Court of the United States said:

"It was therefore properly a question for the determination of the jury whether or not the scales were maintained in a reasonably safe place, and if not, whether the plaintiff had notice thereof. The Court of Appeals was of the opinion, and rightly we think, that the dangerous contiguity of the scale box to track No. 2 and the extra hazard to switchmen resulting therefrom was not so open and obvious other than a close inspection as to justify taking from the jury the determination of the question whether there had been an assumption of the risk. Plaintiff was entitled to assume that the defendant company had used due care to provide a reasonably safe place for the doing by him of the work for which he had been employed, and as the fact that the defendant company might have performed such duty in respect to the scale box in question was not so patent as to be readily observable, the court could not declare, in view of the testimony of the plaintiff as to his actual want of knowledge, that he has assumed the hazard incident to the actual situation."

Judge Maxey, in instructing the jury on the question of assumption of risk used the following language:

"In this connection you are instructed that the mere fact that the plaintiff knew of the existence and location of the scale box would not, as a matter of law, charge him with knowledge of the danger, if danger there was, due to its proximity to the north rail of track No. 2, and whether he knew of the danger is a question of fact for you to determine from a consideration of all the facts and circumstances in evidence."

We earnestly insist that the language used by the Supreme Court in the Swearingen case, as well as its approval of the language in the charge of the trial court, absolutely states the fact so far as the Supreme Court of the United States is concerned, that before an employee, as a matter of law, assumes the risk he must have knowledge of the danger, or in other words, appreciate the danger at the time of the happening of the accident. It is not enough that he could have acquired this knowledge by inspection or by making inquiry, and as there is no evidence to prove that Mr. Linder knew of the close proximity of the end of the mail crane in question, or was charged with the duty of using or operating it, as a matter of law, it could not be said that he should have appreciated the danger, but these were facts necessary to be passed upon by the jury.

The Chesapeake & Ohio R. R. Co. v. Cowley, 166 Fed., 283, is a case in which a brakeman was struck by a water spout. The Circuit Court of Appeals in passing on the question said:

"The building and maintenance by a railroad company of a structure so near its track, that it is likely to strike a brakeman riding on top of a passenger car, is negligence per se, and a trainman does not assume the risk of injury from such structure merely because he knew of its existence and general location."

We submit in view of the above Federal authority, that the mere proof that deceased knew of the existence and general location of the mail crane would not, as a matter of law, charge him with having assumed the risk of the close prox-

imity of the mail crane and the danger incident to its use at that time.

The case of Norfolk & W. Ry. Co. v. Beckett, 163 Fed., 479, is a case where a conductor was struck by a stand pipe maintained on the side of the track. On the authority on the McDade case, supra, the court said:

"It is negligence and a breach of its duty to its employes for a railroad company to build a stand pipe so near to its track to endanger the employes on passing trains when engaged in the performance of their duties, and such employes do not assume the risk of such structures merely because they knew of its existence and general location."

The Court said further:

"That the plaintiff had seen the stand pipe in question is not disputed, but there is not a scintilla of evidence that he ever saw a box car pass it so as to be able to observe the space between it and the car. In other words, he had knowledge of the existence of the stand pipe and its relative position to cars while passing in a general way, but there is nothing to show that he had any knowledge as to the increased hazard resulting from the close proximity of the stand pipe to the track," citing T. & P. Ry. Co. v. Swearingen.

In the case of St. Louis Ry. Co. v. Conley, brought under the Federal Employers' Liability Act for the death of an engineer killed by being struck by a post while passing through a tunnel, the question of non-liability and assumption of risk were the principal questions on appeal, and in deciding the case the Court said:

"We think it is a general rule that where it is possible to do so a railroad company is required to place its structures used in connection with its road at such a distance from the track that they will not endanger its employes in operating trains, and where structures are placed by a company in such close proximity to the track that they endanger their ser-

vants while discharging their duty, the company is liable for an injury," citing the McDade case.

On the question of the assumption of risk the Court said:

"But it is said that Canley was familiar with the tunnel, having been through it many times. Therefore, he assumed the risk."

After discussing the testimony on the question of assumption of risk, the court said:

"It might be death to look out of the cab and death not to look out when the injector is not working properly. We think the question of assumption of risk was properly left to the jury."

The case of West v. Chicago, B. & Q. Ry. Co., 179 Fed., 801, was an action brought under the Federal Employers' Liability Act to recover for the death of a brakeman on a freight train who was killed in the night time while on the top of a car by his head striking an overhead bridge. The railroad company made the usual contention of failure to prove negligence and assumption of risk. In passing on the question the Circuit Court of Appeals said:

"To charge a railroad brakeman with assumption of risk of injury from the low overhead bridge, by which he was struck and killed, it must be shown that he had either actual or constructive notice not only of the existence of the bridge, but of the fact that it was so low as to be dangedous, and also that the circumstances at the time of the injury were such as not to excuse a reasonably prudent person from having the memory of the peril within the immediate field of his consciousness," citing as authority McDade and Swearingen cases, supra.

Hawley v. Chicago, B. & Q. Ry. Co., 133 Fed., 150, was a case brought by a switchman for damages on account of being struck by the corner of the roof of a house. It is shown that plaintiff, while switchman and foreman, had been working in this yard for a great length of time, and while riding on the top of a car was struck by the side of the house or

roof and seriously injured. In passing on the question of assumption of risk the Court said:

"The knowledge actual or constructive, that must be brought home to decedent was not knowledge that the freight house roof had corners, but knowledge from the dangers of the possible relation between the roof corners and the projection from the top of a car to the middle of the house track at a certain height on a car. But actual knowledge was not proven. On this record we think defendant failed to discharge the burden of establishing conclusively a state of facts on which the law should charge decedent with having assumed the risk," citing McDade and Swearingen cases.

In the case of Boston & M. R. R. Co. v. Baxter, 228 Fed., 262, a fireman was killed by striking his head against the side of the bridge. The accident occurred in the yards while the train was moving out and occurred in open daylight. The deceased was not at his place of duty at the time of the accident, but had crawled upon the tender to secure a rake and thus exposed himself to being struck by the bridge. In holding that the case should have been submitted to the jury on the question of assumption of risk, Justice Putnam, in rendering opinion for the Circuit Court said:

"It was settled so far as we are concerned in Vermont Ry. v. Bethune, 206 Fed., 868, that the Employers' Liability statutes of the United States do not suspend the common law doctrine of assumption of risk in cases where the common law doctrine formerly applied, and no violation of any statute on the part of the defendant, is proven. This proposition is in harmony with the later decisions of the Supreme Court in the case of Ry. v. Horton, 233 U. S., 492. The bridge with which the head of the intestate came in contact causing his death was not maintained in violation of any statute, but if maintained through any fault of the railroad company it was through the fault which was in violating only of the rules of common law. Therefore, so far as I can perceive,

the intestate might have assumed the risk of the events which caused his death in accordance with all rules of common law. The plaintiff in error was entitled to have the case submitted clearly to the jury on the question as to the acceptance of risk with whatever qualifications properly grow out of these suggestions."

In the case of Terminal Co. v. Jarvis, 227 Fed., 9, suit was brought under the Federal Employers' Liability Act for injury to a yard foreman, who, while riding on a high car, was struck by a bridge and injured. The court made the following finding of fact as to notice:

"It was undisputed that Jarvis had been employed in the defendant's yards either as conductor or brakeman on freight trains for more than a year, during which period he had passed on such trains under the bridge by night as well as by day quite frequently as brakeman and sometimes, but not as often, as conductor. He was also aware that freight cars received at the yards varied in height."

Under the above finding the Circuit Court of Appeals held that the question of whether or not plaintiff assumed the risk was properly a question to be submitted to the jury for their determination.

In the case of Barnhart v. K. C. & O. M. Ry. Co., 184 S. W., 176, suit was brought by the plaintiff alleging negligence as follows: That while plaintiff was riding on the side of a box car in the yards he was struck by a stand pipe and knocked from the train and injured. The case was before the Court of Civil Appeals, 145 S. W., 1049, and was reversed by that court. Writ of error was granted by the Supreme Court, and in a well considered opinion by Justice Yantis the question of assumed risk in cases of this character was fully discussed. The evidence showed, as set out by the Court of Civil Appeals, that the plaintiff knew of the existence of the stand pipe as well as its location. In reversing the Court

of Civil Appeals and affirming the case the Supreme Court said:

"The court had charged fully in behalf of the defendant in error on its own defense of assumed risk. We think the duty then arose, in order that the jury might not be misled, for the court to advise them that it did not devolve upon the plaintiff to make an inspection of the place which had been provided him in which to work to ascertain if the defendant in error had been guilty of negligence in placing some obstruction so near the track as that he might be injured. The plaintiff had the right to rely upon the master to furnish him a safe place to work, and he need make no inspection to ascertain whether the master had discharged this duty. He assumed the risks ordinarily incident to his employment, but he did not assume the risks arising from the master's negligence in failing to furnish a safe place in which to work, unless the danger was obvious, or unless he had actual knowledge thereof.

The case of International I. & G. Ry. Co. v. Stephenson, 54 S. W., 1086, writ of error denied by the Supreme Court, was one where the engineer while operating his engine was struck by a mail crane and injured. The Court of Civil Appeals found the following facts:

"Plaintif knew of the presence of mail cranes at several stations on the road, but freight trains did not carry mail, and he was not expecting or looking out for any dangers from the crane. He did not see or look for the crane."

In that case the court held that he did not, as a matter of law, assume the risk.

In the case of Texas & Pacific Ry. Co. v. Johnson, 106 S. W., 883, writ of error denied by the Supreme Court, is a case in which an engineer while operating his engine into the roundhouse was truck by one of the columns supporting the roundhouse, and killed. The issue of assumed risk was

strongly relied upon by appellant in the trial court, but the Court of Civil Appeals held that the question of whether or not deceased was guilty of contributory negligence, or assumed the risk, was for the jury.

The foundation of the assumption of risk, is actual knowledge as well as the fact, that the employee must appreciate at the time of the accident the danger incident to the defect due to the negligence of the company. As has been repeatedly held, both by state and federal courts, it is not enough that the employee should have a general knowledge of possible danger, but he must have actual knowledge to such an extent as to cause him to appreciate or know the danger of using the instrumentalities immediately at the time of the accident.

L. & N. Ry. Co. v. Millikins, Admx., 51 S. W., 797, was a mail crane case, and the Supreme Court of Kentucky held that a freight brakeman would not assume the risk of being struck by a mail crane, unless the mail crane is closer to the track than is reasonably necessary. In that case it was shown, as in the case at bar, that the mail crane could have been put at a greater distance from the track, and would have been reasonably safe for taking the mail.

The case of Ry. Co. v. Gregory, 58 Ill., 272, was one where an employee while in the discharge of his duties on a moving train was struck by a mail crane and injured. The Supreme Court of Illinois held that it was a question of fact for the jury to say, under all the facts and circumstances in evidence, whether or not the injured employee assumed the risk. In that case the evidence showed that the crane could have been placed at a greater distance from the track.

In Rowland v. Chicago N. W. Ry Co., 135 N. W., 156, was a case under the Federal Employers' Liability Act in the Circuit Court of Wisconsin for damages to a fireman who was truck by a mail crane while operating a mail train. The

contention was strongly made in that case that the railroad company was not guilty of negligence, and if guilty of negligence, the plaintiff assumed the risk. In passing on the case, the Court said:

"We are satisfied that the questions of assumption of hazard and contributory negligence are jury questions, and that the court cannot say, as a matter of law, that plaintiff either assumed the risk or was guilty of contributory negligence."

The case of Brown v. New York Central Ry. Co., was an action to recover for a fatal injury sustained by a fireman in collision with a mail crane located too near the track. The Supreme Court of New York held that the question of contributory negligence and assumed risk were questions for the jury.

In the case of G. R. & D. Ry. Co. v. Butchard, 86 Pac'fc. 749, the deceased fireman on a passenger train while leaning out of the cab window, looking backward, was struck by a mail crane located 180 feet north of the station. At the time of the accident the mail sack was suspended from the arm of the crane. The evidence showed that the crane was located from 13 to 20 inches nearer the track than was necessary for its efficient operation. It was the contention of the railroad company that, as a matter of law, the deceased assumed the risk and was guilty of contributory negligence. On that question the court said:

"In this case the evidence is conflicting as to the facts going to show assumption of the risk. Further, minds could reasonably differ as to whether the danger from this crane, if located as the evidence of appellee tended to show, was so obvious as to justify us in declaring, as a matter of law, that deceased assumed the risk. We think that both this question and the one of contributory negligence were properly for the jury."

We respectfully submit that the jury, under the evidence before them on the trial of this case, were fully justified in

finding negligence on the part of the defendant, which was the proximate cause of the death of the deceased, and that under the evidence and the decisions of the courts of last resort above set out, deceased did not assume the risk and we therefore ask that the case be in all things affirmed.

Respectfully submitted,

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No. 106

IN THE

Supreme Court of the United States

October Term, 1919.

SOUTHERN PACIFIC COMPANY, *a corporation,*
Petitioner and Plaintiff in Error,

vs.

W. S. BERKSHIRE, *Temporary Administrator and Personal Representative of the Estate of* WILLIAM A. LINDER, *Deceased,*
Respondent and Defendant in Error.

Petitioner's Brief on Certiorari to the Court of Civil Appeals of Texas

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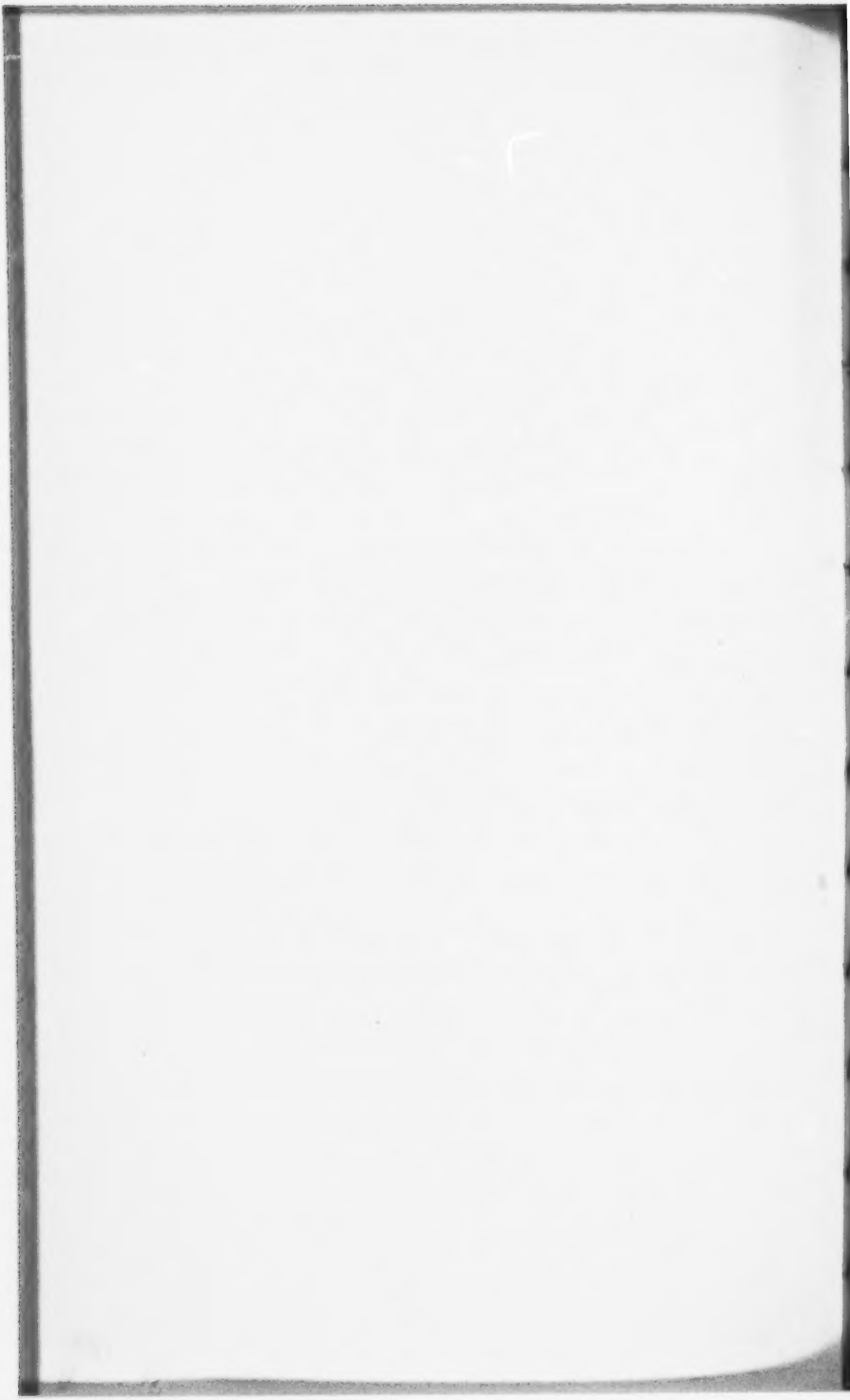


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No. 372.

IN THE

Supreme Court of the United States

October Term, 1919.

SOUTHERN PACIFIC COMPANY, *a corporation, Petitioner and Plaintiff in Error,*

vs.

W. S. BERKSHIRE, *Temporary Administrator and Personal Representative of the Estate of* WILLIAM A. LINDER, *Deceased, Respondent and Defendant in Error.*

PETITIONER'S BRIEF ON CERTIORARI TO THE COURT OF CIVIL APPEALS OF TEXAS

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

ABSTRACT OF THE CASE

Your petitioner, Southern Pacific Company, obtained from this Court a Writ of Certiorari to the Court of Civil Appeals of Texas under which there has been certified to this Court for review and determination the final judgment rendered by said

Court of Civil Appeals of Texas affirming the judgment of the District Court of El Paso County, Texas, 41st Judicial District, dated December 10, 1917, awarding fifteen thousand dollars damages, together with 6 per cent interest in accordance with verdict of the jury against Southern Pacific Company for injuries resulting in the death of said William A. Linder. In said case there was claimed by your petitioner a right, privilege and immunity under the Federal Employers' Liability Act of April 27, 1908, Chapter 149, 35 Stats. 65, which claim of right, privilege and immunity was denied by judgment of the said Court of Civil Appeals for the 8th Supreme Judicial District of Texas.

The writ was granted under the provisions of Section 237 of the Judicial Code, as amended September 6, 1916, Chapter 448, 39 Stats. 726.

Respondent, as plaintiff in the Court below, brought suit as temporary administrator and personal representative of the Estate of William A. Linder, deceased, against petitioner, the defendant in the Court below, for the use and benefit of the surviving wife and children of the said William A. Linder, deceased. Plaintiff alleged that on July 3, 1916, the deceased, William A. Linder, was employed by defendant company, as locomotive engineer running between El Paso, Texas, and Lordsburg, New Mexico, and that while running and operating an engine attached to one of defendant company's

trains between said points at Carney, New Mexico, deceased was struck by a mail crane and was so injured that he died shortly.

Plaintiff alleged that defendant was guilty of negligence by placing and maintaining a mail crane, or such portion or part of the same, in such close proximity to track and engine as to strike the deceased while occupying his customary place on the engine.

There were also further allegations of negligence all of which plaintiff alleged were the proximate cause of the accident which resulted in the death of William A. Linder (Tr. pp. 2 to 7).

Defendant answered by a general demurrer and general denial, by plea that decedent met his death while in the employ of defendant company and while engaged in interstate commerce, and answered that Linder's death was due to risks and dangers assumed by him for which defendant was not liable (Tr. pp. 8, 9).

On trial before a jury, the verdict was rendered in favor of plaintiff for fifteen thousand dollars apportioned to the surviving wife and children (Tr. p. 14).

The defendant's motion for a new trial was denied on the 4th day of January, 1918 (Tr. p. 29), to which action of the Court defendant excepted and appealed to the Court of Civil Appeals for the 8th

Supreme Judicial District at El Paso, Texas. Said Court handed down its judgment on the 5th day of December, 1918, affirming the judgment of the District Court of El Paso County, Texas.

On September 18, 1918, petitioner filed its petition for a rehearing by said Court of Civil Appeals of Texas, which was denied by that Court on the 2d day of January, 1919. Thereafter and within due time, petitioner filed its petition with the Supreme Court of Texas asking for a writ of error to review said judgment of the Court of Civil Appeals of Texas, which petition was denied by the Supreme Court of Texas on the 12th day of March, 1919.

ASSIGNMENTS OF ERROR

Petitioner was deprived of an asserted Federal right because:

(1) The Court submitted the question of petitioner's negligence to the jury; and

(2) The Court submitted the question of assumption of risk by Linder to the jury (Tr. pp. 10-13), although the record clearly shows that the injuries suffered by Linder were not caused by the negligence of the defendant company but were solely due to Linder's own negligence, and also because it was shown without contradiction that Linder's death was due to risks and dangers assumed by him, risks of which he knew because they were obvious and he had

an opportunity to observe them, and there was no issue of fact on this question to be submitted to a jury. In spite of this fact the Texas Court of Civil Appeals affirmed the judgment of the trial court.

STATEMENT OF FACTS

The record shows that at the time of the accident resulting in the death of William A. Linder he was in the employ of defendant company and engaged in operating a train and engine then engaged in interstate commerce. This fact was agreed to by counsel for plaintiff and defendant (Tr. p. 46); consequently the case was covered by Employers' Liability Act.

The undisputed evidence in the case showed that Linder had made ninety-nine trips over defendant company's line from El Paso to Deming, New Mexico, by the station of Carney, New Mexico, where the mail crane is located, from July 1, 1914, to December 21, 1914, and had made one hundred and fifty-four trips over said company's line past the point of the accident, during the six months immediately preceding his accident on July 3, 1916, and during all of this time the said mail crane was in the same position and similarly located as it was at the time of the accident to said deceased Linder. The undisputed evidence also shows that said trips were made by Linder on both freight and passenger trains, some of which passenger trains took up the mail at Carney, New Mexico, and that there were at least six

mail cranes similar to the one in question and similarly situated on defendant's lines, between El Paso and Deming. The mail crane at Carney was erected in conformance with postoffice regulations and subject to the specifications of postal department (Tr. pp. 39, 40, 41, 45).

All cranes are at a standard distance from the side of the car, that is, they are all the same distance exactly, and the same hook that would take a sack off a train in Arizona or New Mexico would take it off as it goes through Western Kansas (Tr. p. 38).

The undisputed evidence also shows that the mail crane at Carney, New Mexico, could be seen one-half a mile down the track by the engineer when traveling in the direction in which deceased was traveling at the time of the accident to him, and that deceased was struck by said mail crane while passing it (Tr. p. 43).

Nobody witnessed the accident, which occurred shortly after 9 o'clock a. m., July 3, 1916. Linder was found after passing Carney Station in his seat with his arm and head out of the car (Tr. pp. 33, 34).

It was pleaded by plaintiff and urged strongly that the defendant had been negligent in placing the mail crane too near the tracks, but it was positively shown without contradiction that this mail crane at Carney was similarly situated to all the other cranes on defendant's lines.

One of defendant's witnesses, G. A. Thumb, employee of the defendant, who had been running over this line from El Paso west and on the Tucson Division since 1888, testified without contradiction that there were between El Paso on the Rio Grande and Deming, New Mexico, seven mail cranes. This witness testified that he was familiar with the cranes along there in July, 1916, the month in which the accident befell Linder; that he saw no difference in the crane at Carney from the other ones; that it was not too close; that he passed by the crane at 12 o'clock on the night of the day on which the accident befell Linder; that he had seen an account of the accident to Linder in the newspaper and naturally took notice of the crane and its position; that the crane was not too close and that it was situated similarly to all the other cranes between El Paso on the Rio Grande and Deming, New Mexico. This witness further testified that the crane at Carney, New Mexico, could be seen one-half a mile down the track, and that in traveling west, the direction in which Linder was traveling at the time of the accident, the crane could be seen for half a mile (Tr. pp. 42, 43).

It was shown without contradiction that the accident occurred in broad daylight, after 9 a. m., and that the track at Carney is straight for twenty miles and was in good condition at the time of the accident, and that the mail crane is plainly visible to an en-

gineer many hundreds of feet traveling west from El Paso to Deming and by the station of Carney (Tr. pp. 43, 45).

Defendant's witness, Haley, testified as to the number of trips deceased Linder had made during the year 1916, and showed that part of his trips were made on passenger trains and part on freight trains, and that Linder had operated passenger trains Nos. 1 and 2 as locomotive engineer, and that passenger trains No. 1 going west and No. 2 going east took up the mail at Carney (Tr. pp. 39, 40, 45).

ARGUMENT

On the evidence in the record the Court should not have submitted to the jury the question of defendant's negligence and the question of assumption of risk by Linder, because the injuries suffered by Linder were not caused by the negligence of defendant company but were due solely to his own negligence, and also because it was shown without contradiction that Linder assumed the risks because he knew of them and because they were obvious and he had an opportunity of observing them, consequently there was no issue of fact on this question to be submitted to a jury.

The action of the Court of Civil Appeals of Texas in affirming the erroneous judgment of the Trial Court deprived petitioner of a right claimed by it

under Federal Employers' Liability Act of April 27, 1908. The denial of this right raised a Federal question reviewable by this Court.

Seaboard Air Line vs. *Padgett*, 236 U. S. 668;

Chicago, Rock Island & Pacific vs. *Devine*, 239 U. S. 52;

New York Central & Hudson Railroad vs. *Tonsellito*, 244 U. S. 360.

Linder, at the time of his death on the morning of July 3, 1916, was employed in interstate commerce and consequently Federal Employers' Liability Act applied and Linder had assumed all the risks and dangers incident to his employment and the injury which he received and which resulted in his death was the result of such risk.

The facts of the case of *Kenney* vs. *Meddaugh*, 118 Fed. 209, which case was cited in defendant's brief in the Court of Appeals, are almost identical with the facts in the case involved. In the Kenney case it was shown that decedent had been employed by defendant as a fireman for not quite a year before the accident; in that time he had worked on both divisions of the defendant's road, but most of the time on the eastern division from Battle Creek to Fort Huron. He had made in all 206 trips, of these 123 were made on the eastern division and 83 on the western. He had worked on both freight and passenger trains. The accident which resulted in decedent's death happened after dark at Climax, a

station on the eastern division of defendant's railroad extending from Battle Creek, Michigan, to Chicago, Illinois. At about 475 feet east of Climax a mail crane was stationed to hold mail pouches to be taken aboard fast passenger trains when stopping at that point by means of mail pouches attached to mail cars. As decedent's train passed this mail crane on the fateful evening, he was struck in the forehead by the upper hook of the crane and rendered unconscious, and shortly thereafter died. No one saw the collision and it was only a matter of inference from the circumstances that his death was due to this cause, but there was no doubt that it was so. It was shown that in addition to the night in question being dark, it was snowing, though to no great extent, and blowing hard.

In this case and on this state of facts, the Court held that a locomotive fireman will be held to have assumed the risk from the proximity to the track of the mail crane, he having been a fireman on the engine and having passed this place eighty-three times and having been over the other division one hundred and twenty-three times, and the crane having been in position all that time at substantially the same distance from the track as the other cranes on both divisions, and this, though it was dark and blowing hard and snowing, these circumstances merely requiring extra caution on his part.

The Court further held that the railroad company could not be held to have failed to have used

due care, which would provide a locomotive fireman a reasonably safe place to work, by reason of the fact that the mail crane, when in position, was at its nearest point nearly 13½ inches from the side of the locomotive, this being the distance of other cranes on this and other roads.

In this case the lower Court had granted defendant peremptory instructions on the ground that as a matter of law the defendant had not been guilty of negligence; that decedent had asumed the risk of the proximity of the mail crane to the track, and that, if defendant had been guilty of negligence, decedent had likewise been guilty of contributory negligence. The Circuit Court of Appeals for the Sixth Circuit affirmed this action of the lower Court.

It is respectfully submitted that the law as laid down in the case of *Kenney* vs. *Meddaugh* is correct, and should have been applied to the facts in the present case.

The case of *Missouri Pacific Railway* vs. *Somers*, 9 Southwestern 741 (Supreme Court of Texas), is also very much in point. Here a brakeman in attempting to let off a defective brake was struck by a cattleguard, which, like all the guards along the road, was near the track. The Court held that although the brakeman did not know of the proximity to the track of the one in question he could not recover as he was held to have assumed all the risks

incident to his employment. In its judgment the Court said (at page 742):

> "But can he be said not to have known of the position of the cattleguards? It does not appear that at the time of the accident he was a new hand upon the road, and the evidence shows that at the time of this accident the guards were all about the same distance from the track, and, according to the theory of plaintiff's case, in dangerous proximity to it. Is it to be held under these circumstances that he did not know the condition of the road with respect to its cattleguards, and did not take the risks incident to that condition? Suppose it had been shown that he knew every cattleguard upon the road but the one in question, and knew them all to be too near the track, but did not know of this, would it be claimed that he did not, in going upon the road with the knowledge, assume the hazards of this faulty construction, and that he could recover for an injury inflicted by the one he had not observed? This, it seems to us, would be unreasonable; and yet such is practically the case before us."

The case mainly relied upon by the Court of Civil Appeals of Texas in its opinion was the case in the Supreme Court of Texas, *M. K. & T. Ry.* vs. *Williams*, 103 Texas 228, which was a mail crane case, but there were elements in that case which were not present in the Linder case. The negligence alleged in the Williams case was (1st), locating the crane too near the track, and(2d), in allowing the ties of the track near it to be in such rotten condition

as to allow an engine to rock and sway so as to cause a collision. The charge of the Court submitted both issues made by the pleadings to the jury.

It was found in the opinion of the Court of Appeals that after the mail sack was hung it left only 13¾ inches space between the ends of the iron clasps and the side of the engine. The Court of Appeals found, as a matter of fact, that the natural swing of the engine on its springs when the track was in good repair, was 4 inches, which when taken from the 13¾ inches left 9¾ inches as a clearance when the track was in good repair. The Court of Appeals further decided that it was a fact that an examination of the ties immediately after the accident showed that they were rotten and that one of the ties had a broken piece three inches square and 18 inches long and that right near the mail crane there was another very rotten tie.

There was also evidence that the engine which Williams operated at the time weighed 140 tons and there was evidence that an engine of this weight would roll and sway on its springs when operated over the track so that the cab of the engine would have extended out 12 inches closer to the crane than at the time it was perpendicular.

The Court held that this testimony was uncontradicted and therefore the cab was brought so as to almost or nearly come into colliston with the extended arm of the mail crane, and this was shown

by actual measurement. The Court also held that the evidence raised an issue for the jury to say whether the condition of the track constituted negligence. When the case reached the Supreme Court of Texas that Court was bound by the findings of fact and held on those facts that the proximity of the crane in view of the condition of the track and roadbed which caused the engine to sway and swing was negligence on the part of the railroad. It will be noticed, however, that the law of assumed risk was not discussed in this case for the reason that the record did not show that at the time the deceased Williams was killed he was operating the train in interstate commerce, nor did the record show that the defense of assumed risk was pleaded.

The facts in the Williams case are so different from the facts and circumstances under which Linder met his death that it is respectfully submitted that the decision of the Williams case has no bearing on the present case.

The Court of Civil Appeals cited in its judgment the case of *Gila Valley, G. H. & N. Ry. Co.* vs. *Hall,* 232 U. S. 101, stating that in their opinion this case presented a clear statement of the doctrine of assumed risk, and cited in part as follows:

> "Moreover, in order to charge an employee with the assumption of a risk attributable to a defect due to employer's negligence, it must appear not only that he knew (or is presumed to have known) of the defect, but that he knew

> that it endangered his safety, or else such danger must have been so observable that an ordinary prudent person under the circumstances would have appreciated it."

The law as laid down in this case is unquestionably correct, having regard to set of circumstances with which the Court was dealing, which were not similar to the facts in the Linder case.

Under the law laid down in the above cited case an employee must know or be presumed to have known the defect and also to have known that it endangered his safety or the danger must be such that an ordinary prudent person would have appreciated.

There can be no question from the facts in the Linder case, it having been shown without contradiction that Linder had passed this point at Carney a great number of times and had passed it in trains which took up the mail from the mail crane; that he must have known of the proximity of the mail crane to the track and he must have appreciated such danger as there was in passing this point.

The law as laid down in the case of *Jacobs* vs. *Southern Railway Company,* 241 U. S. 229, is applicable to the present case. In that case it was held that an experienced employee admittedly knowing the material conditions and the presence of a pile of cinders, who attempts to board a moving engine with a vessel of water in his hand, must be consid-

ered as appreciating the danger and assuming the risk, although at the time he may have forgotten the existence of the cinders, and this is so even if the employer was negligent in allowing the cinders to remain.

In this case the Court affirmed its ruling in the case of *Seaboard Air Line* vs. *Horton,* 223 U. S. 492, to the effect that there being no violation of any safety statute, the common law defense of assumption of risk is not eliminated in such case by the Employers' Liability Act.

In the present case it was not even contended that there had been any violation of any safety statute.

The law of assumed risk is well laid down in the recent case of *Cunard S. S. Co.* vs. *Smith,* 255 Fed. 846 (Circuit Court of Appeals, Second Circuit). In this case it was held that an experienced longshoreman engaged in loading buckets of dirt, which were hoisted out of the hold of a vessel and by means of a winch and tackle swung over to a lighter and dumped, who knew there was no landing man to watch for descending buckets, assumed the risk of injury therefrom. In its judgment, the Court said (at page 849):

> "In this case the elements out of which the danger arose were plainly visible. There was nothing present calculated to blind the plaintiff to his danger. The danger involved in working in the hold under the circumstances must have

> been understood by him every minute of the time he was at work that evening, and he could not have but known that he was liable to receive the injuries which he suffered and for which he seeks to recover. One who under such circumstances works assumes the risks as matter of law. For any person of ordinary prudence knew that to work under such conditions necessarily endangered his safety. *Butler* vs. *Frazee*, 211 U. S. 459, 467, 29 Sup. Ct. 136, 53 L. Ed. 281.
>
> Judgment is reversed without prejudice."

In the case of *Butler* vs. *Frazee*, 211 U. S. 459, this Court has laid down the law very clearly on the doctrine of assumed risk. In that it was held that an employee in a laundry, who had been employed in laundries for two years and was familiar with the machinery used therein, could not recover for injuries received by a machine on which she had been working for three months, and the imperfections, if any, of which she did not at any time report to her employer. Mr. Justice Moody delivered the opinion of the Court, and, in the course of his judgment (at pages 465-467) said:

> "One who understands and appreciates the permanent conditions of machinery, premises and the like, and the danger which arises therefrom, or by the reasonable use of his senses, having in view his age, intelligence and experience, ought to have understood and appreciated them, and voluntarily undertakes to work under those conditions and to expose himself to those dangers, cannot recover against his employer for the resulting injuries. Upon that state of

facts the law declares that he assumes the risk. The rule is too well settled to warrant an extensive discussion of it or an attempt to analyze the different reasons upon which it has been held to be justified. The rule of assumption of risk has been thought by many a hard one when applied to the complicated conditions of modern industry, so largely conducted by the aid of machinery propelled by irresistible and merciless mechanical power, and the criticism frequently has been made that the imperative need of employment leaves to the workman no real freedom of choice, such as the rule assumes. That these considerations have had an influence is shown by the notorious unwillingness of juries to apply the rule, and by the legislative modifications of it which, from time to time, have been made, as, for instance, by Congress in the Safety Appliance Law.

* * * * * *

Where the elements and combinations out of which the danger arises are visible it cannot always be said that the danger itself is so apparent that the employee must be held, as matter of law, to understand, appreciate and assume the risk of it. *Texas & Pacific Ry. Co.* vs. *Swearingen,* 196 U. S. 51; *Fitzgerald* vs. *Connecticut River Paper Co.,* 155 Massachusetts, 155. The visible conditions may have been of recent origin, and the danger arising from them may have been obscure. In such cases, and perhaps others that could be stated, the question of the assumption of the risk is plainly for the jury. But where the conditions are constant and of long standing, and the danger is one that is suggested by the common knowledge which all pos-

sess, and both the conditions and the dangers are obvious to the common understanding, and the employee is of full age, intelligence and adequate experience, and all these elements of the problem appear without contradiction from the plaintiff's own evidence, the question becomes one of law for the decision of the Court. Upon such a state of the evidence a verdict for the plaintiff cannot be sustained, and it is the duty of the judge presiding at the trial to instruct the jury accordingly. *Patton* vs. *Texas & Pacific Railway Co.*, 179 U. S. 658, and cases there cited. The case at bar falls within this class."

We respectfully call the Court's attention also to the cases of *Boldt* vs. *Pennsylvania R. R.*, 245 U. S. 441, and *Baugham* vs. *New York, Philadelphia & Norfolk R. R.*, 241 U. S. 237.

In conclusion we respectfully urge upon the Court that the decision of the Circuit Court of Appeals for the Sixth Circuit, in the case of *Kenney* vs. *Meddaugh*, 118 Federal 209, and the decision of this Court in *Butler* vs. *Frazee*, 211 U. S. 459, correctly state the law as applied to the facts in the present case and should be approved by this Court.

It is respectfully submitted that the Court of Civil Appeals of Texas erred in affirming the judgment of the District Court of Texas for the Forty-first Judicial District and that by doing so it deprived your petitioner of a right, privilege and immunity claimed by it under a statute of the United States, to-wit: Federal Employers' Liability Act of April 27, 1908.

We therefore respectfully request that the judgment of the Court of Civil Appeals of Texas be reversed and that Court directed to enter judgment for petitioner.

Respectfully submitted,

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HENRY H. GOGARTY,
Of Counsel.

SOUTHERN PACIFIC COMPANY v. BERKSHIRE, TEMPORARY ADMINISTRATOR AND PERSONAL REPRESENTATIVE OF LINDER.

CERTIORARI TO THE COURT OF CIVIL APPEALS, EIGHTH SUPREME JUDICIAL DISTRICT, OF THE STATE OF TEXAS.

No. 106. Submitted November 19, 1920.—Decided January 3, 1921.

1. The installation of railway mail cranes so close to the track that the arm of a crane when extended comes as near as 14 inches to the window of an engine cab, thus becoming a source of danger to the engineer while in performance of his duty, is not negligence upon the part of the railroad company as respects its employees, when such placing of the cranes is uniform along the railroad, and done by direction of the Post Office Department pursuant to a plan it found necessary in handling the mails. P. 417.
2. *Held*, that the question whether such installation was negligence should not have been submitted to the jury.
3. An experienced locomotive engineer who has operated many times over a railroad where mail cranes are set up close to the track, must be presumed to have known the danger of his being struck by their projecting arms when leaning from his cab window in discharge of his duty, and must be held, as a matter of law, to have assumed the risk. P. 418.

207 S. W. Rep. 323, reversed.

THE case is stated in the opinion.

Mr. W. I. Gilbert and *Mr. Wm. F. Herrin* for petitioner. *Mr. Guy V. Shoup* and *Mr. Henry H. Gogarty* were also on the briefs.

Mr. C. B. Hudspeth and *Mr. Geo. E. Wallace* for respondent. *Mr. A. J. Harper* was also on the brief.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action brought in a state court against the petitioner for causing the death of Linder, the plaintiff's

intestate. At the trial the petitioner requested instructions that Linder assumed the risk of injury from the cause complained of and that a verdict should be rendered for the defendant. These were refused, the defendant saving its rights upon the record, and the plaintiff got a verdict and judgment. The Court of Civil Appeals affirmed the judgment; the Supreme Court denied a writ of error, and thereupon a writ of certiorari was allowed by this Court upon the ground that an immunity set up under the Federal Employers' Liability Act was involved.

The facts so far as made definite by the evidence are not in dispute. Linder was employed by the defendant as an engineer upon a train running from El Paso, Texas, to Deming, New Mexico. At Carney, in New Mexico, he was found sitting on his engineer's seat, unconscious, with his right arm and pretty nearly half of his body outside of the cab, leaning with the right side and arm over the arm rest of the engine. There was a cut about an inch over the right ear. He had been struck by the end of a mail crane, or a mail sack that had been placed on it to be picked up by a mail train following Linder's which was an extra carrying soldiers. In order to have uniformity the Post Office Department fixes the distance of the cranes from the equipment, and the length of the hooks, so that, in the language of a witness for the plaintiff, "the same hook that will take a sack off a crane in Arizona or New Mexico will take it as it goes through western Kansas." The evidence was all to the effect that this crane stood at the same distance as all the others along the road. The end of the crane when elevated was not nearer to the train than fourteen inches, but might have been found to be as near as that, and therefore near enough to be capable of hitting a person leaning out of the window, as indeed was shown by the event.

Linder had been upon this route for some years, had

passed over it many times and must be presumed to have known of the crane. It was visible from the engineer's seat half a mile ahead, through a front window. About a mile before reaching Carney Linder had noticed that the main driving pin on the engine was getting hot, had crept out upon the running board to see about it, and had returned. It may be supposed that at the time of the accident he was leaning out of the side window to look at it again and was acting in the course of his duty. The position in which his body was first seen and the place of the wound indicate that he was more than fourteen inches out from the engine's side.

In this case the question is not whether a reasonable insurance against such misfortunes should not be thrown upon the travelling public through the railroads, or whether it always is possible for a railroad employee to exercise what would be called due care for his own safety and to do what he is hired to do. The question is whether the railroad is liable under the statute according to the principles of the common law regarding tort. The first element in it is the standard of conduct to be laid down for the road. The standard concerns a permanent condition not only at this place, but at many places along the road and presumably at innumerable others on all the large railroads of the United States. There are no special circumstances to qualify this part of the question—which is whether or not it is consistent with the duty of a railroad to its employees to erect railroad cranes of which the end of the arm when in use is fourteen inches from the side of the train. The railroad is required and presumed to know its duty in the matter and it would seem that the Court ought to be equally well informed. It cannot be that the theory of the law requires it to be left to the uncertain judgment of a jury in every case. *See Southern Pacific Co.* v. *Pool*, 160 U. S. 438, 440.

It is impracticable to require railroads to have no

structures so near to their tracks as to endanger people who lean from the windows of the cars. Most passengers are familiar with cautions against putting out heads or arms. However it may be in other cases where there is more or less choice as to position, this is true as to the postal cranes. The farthest point at which a bag could be picked up is twenty-nine inches, and it requires a less distance than that to be sure of getting the bag. In short it would be impossible to use the contrivance with absolute certainty that no accident would happen if a man put his head out at the wrong moment. It equally is impossible to condemn railroads as wrongdoers simply for adopting the device with the conditions imposed by the Post Office Department. When a railroad is built it is practically certain that some deaths will ensue, but the builders are not murderers on that account when the foreseen comes to pass. On the common-law principles of tort the adoption of an improvement in the public interest does not throw the risk of all incidental damage upon those who adopted it, however fair it may be to put the expenses of insurance upon those who use it. It is going very far to leave it open to a jury to attach liability in tort to a system by which the ends of the arms of postal cranes come to fourteen inches from the car.

But further, we must take it, as we have said, that Linder perfectly well knew of the existence of the crane where it stood, and could have seen it from his seat had he looked, long before he reached it. He entered the employment of the railroad when it had this appliance manifest in its place. The only element of danger that he may not have appreciated was the precise distance which the point of the crane would reach. But an experienced railroad man cannot be supposed to have been ignorant that such a projection threatened danger and, knowing so much, he assumed the risk that obviously would attend taking the chances of leaning well out from

the train. As we have said, the only possible inference on the uncontradicted evidence of the plaintiff's witnesses was that he leaned out considerably more than fourteen inches as shown by the position of his body and the place of the cut on his head. The probability is that the distance of the crane was somewhat greater than the minimum that we have assumed, but that we lay on one side. Confining ourselves to the case of postal cranes we are of opinion that to allow the jury to find a verdict for the plaintiff was to allow them to substitute sympathy for evidence and to impose a standard of conduct that had no warrant in the common law. *Butler* v. *Frazee*, 211 U. S. 459, 465–467. *Kenney* v. *Middaugh*, 118 Fed. Rep. 209.

Judgment reversed.

MR. JUSTICE CLARKE, with whom concurred MR. JUSTICE DAY and MR. JUSTICE PITNEY, dissenting.

Engineer Linder, when leaning out of his cab, in the discharge of his duty to see the condition of a "hot driving pin," was struck on the head and killed by the end of a horizontally extended arm of a mail crane. There is no question of contributory negligence in the case,—the judgment could not be reversed for that, under the Federal Employers' Liability Act. The negligence of the railroad company is palpable but, nevertheless, the finding of a properly instructed jury and of two state courts, is here reversed because this court concludes, as a matter of fact, that the mail crane arm was such an obvious and conspicuous source of danger to Linder that he must be held, as a matter of law, to have assumed the danger from it, by continuing in the service of the company.

The record shows: that Linder was a freight engineer, and as such had nothing to do with mail cranes and had neither occasion nor opportunity, except very rarely, to see what, if any, danger the crane arms could be to him when in the discharge of his duties, for, during the two

years next before his death, he had made but twelve trips on passenger trains, only three of which were on trains which "picked up" mail from cranes; that when mail cranes are not in use the arms hang vertically beside the supporting post, which is three feet eight inches from the side of an engine, and obviously in such position they are not a source of danger to train men; that, on the line involved, the arms of cranes were extended horizontally toward the track, so as to be a source of danger to engineers, only two or three times a day, at widely separated intervals, when they were used to support a mail bag for ten minutes before the arrival of each mail train,—a fraction of an hour in twenty-four; and that Linder, when leaning out of his cab to see the condition of a hot driving pin, was struck an inch above his ear, so that if the arm had been three or four inches farther from the track he would not have been injured.

The record does not show: that government requirements for mail cranes require them to be as close to the track as this one was. On the contrary, the only evidence to the point is that of an employee in the government mail service, who testified, that the hooks on mail cars are adjusted to catch mail bags if within twenty-nine inches of their sides, that allowing for the swaying of the cars, they will catch them if twenty-six inches away, and that the sides of the cars are "flush" with the sides of engine cabs. The point of the crane arm which killed Linder "was about fourteen inches from the side of the cab," but on this evidence it could have been placed twenty-six inches away, where it would not have been a source of danger to him.

Although the civil engineer who had charge of the cranes on the division was a witness for the company he was not asked the distance of the crane causing the injury, or of any other crane, from the track—a suspicious circumstance—and that other cranes were at the same dis-

tance as the one which caused the injury can only be inferred from inadequate statements of witnesses who had never made any measurements and who gave the merest impressions with respect to them. Where, as here, three or four inches is a matter of life and death, random estimates are valueless and should not be accepted, especially when the company certainly had perfectly definite information, which was suppressed. A hard and fast assumption of law should not be based on findings of fact by this court derived from such evidence.

There is no description whatever in the record of the length, dimensions or appearance of the arms of the crane which caused the death of Linder. How, on such evidence, can it be justly stated, that such crane arm was so permanent and conspicuous a source of danger that, as a matter of law, Linder, a freight engineer, usually running past it at high speed when its arms were down, should be charged with knowing and appreciating and assuming the risk!

It has been a criminal offense in Ohio for twenty years to maintain mail cranes nearer than eighteen inches to the nearest point of contact with the widest locomotive on the road erecting such cranes, 97 O. L. 274, and there are similar statutes in other States. If the point of the crane arm here involved had been eighteen inches, four inches farther than it was, from the engine, Linder would not have been injured.

There is no evidence whatever that Linder actually knew that the crane arm extended close enough to the track to cause him injury, and the latest formulation by this court of the rule applicable to the case is: "In order to charge an employé with the assumption of a risk attributable to a defect due to the employer's negligence, [as this defect was], it must appear not only that he knew (or is presumed to have known) of the defect, but that he knew that it endangered his safety; or else

such danger must have been so obvious that an ordinarily prudent person under the circumstances would have appreciated it." *Gila Valley, Globe & Northern Ry. Co.* v. *Hall*, 232 U. S. 94, 102.

Earlier expressions of the rule are that the danger must be "plainly observable" (*Texas & Pacific Ry. Co.* v. *Archibald*, 170 U. S. 665, 672; *Choctaw, Oklahoma & Gulf R. R. Co.* v. *McDade*, 191 U. S. 64, 68), or "so patent as to be readily observable" (*Texas & Pacific Ry. Co.* v. *Swearingen*, 196 U. S. 51, 62).

It is "a strong thing" to hold, on the indefinite evidence in this record, which I have attempted accurately to detail, that a mail crane arm is such a permanent and conspicuous source of danger to a freight engineer as to bring this case within the scope of the decisions cited, and it is a yet stronger thing to reverse the finding of a jury properly instructed, and the judgments, on a question of fact, of two state courts, which the record shows acted with full appreciation of, and with a desire to follow, the decisions of this court with respect to assumption of risk.

In practice certainly, and I think in theory, the decision of the court in this case will introduce a new and unfortunate standard into the law of assumption of risk, which will confuse the doctrine as it has been worked out in the cases cited, will render railway companies careless in placing obstructions near to their tracks, and will result in the injury and death of many innocent and careful men, if the effect of it is not promptly corrected by state and national statutes, and therefore I cannot consent to join in it.